Cases—Continued Page
United States v. *Jones*, 119 U.S. 477 ..... 52–53, 55, 90
United States v. *Klein*, 13 Wall. 128 ..... 9, 14, 30, 62, 73, 97–98, 101
United States v. *Louisiana*, 123 U.S. 32 ..... 9, 30, 63, 73
United States v. *O'Grady*, 22 Wall. 641 ..... 55, 56, 90
United States v. *Union Pacific Railroad Co.*, 98 U.S. 569 ..... 9, 30, 58, 63, 67, 73, 101
United States v. *Yale Todd* (unreported 1794 case, appended to *United States* v. *Ferreira*, 13 How. 40) 108
Wallace v. *Adams*, 204 U.S. 415 ..... 64, 69
Ward, Ex parte, 173 U.S. 452 24
Williams v. *United States*, 289 U.S. 553 ..... 5, 10, 12, 13, 17, 19, 20, 21, 22, 26, 27, 29, 31, 34, 35, 36, 65, 66, 72, 73, 74, 76, 77, 83, 86, 87, 91, 93, 94, 106.
Willing v. *Chicago Auditorium*, 277 U.S. 274 65
Zadeh v. *United States*, 124 C. Cls. 650 108
Constitutional provisions:
Federal:
Article I 16, 18, 66, 69, 106
Article I, Section 8:
Generally 106, 113
Clause 1 ..... 16, 18, 66, 106, 113
Clause 9 113
Clause 17 ..... 66, 104, 105, 113
Clause 18 113
Article I, Section 9, clause 7 44
Article II, Section 2 110
Article III:
Generally ..... passim
Section 1 ..... 18, 30, 42, 63, 98, 113
Section 2 ..... 12, 20, 65, 66, 74, 75, 76, 82, 84, 85, 91, 113
Article IV, Section 3 66
State:
Delaware Constitution of 1792, Article I, Section 9 142
Statutes:
Federal:
Act of March 23, 1792, c. 11, 1 Stat. 243:
§ 2 87
§ 4 87

Statutes—Continued
Federal—Continued
Page
Act of February 24, 1855, c. 122, 10 Stat. 612---- 6, 46
§ 1---- 47, 117
§ 2---- 47, 118
§ 3---- 48, 118
§ 4---- 119
§ 5---- 119
§ 6---- 48, 119
§ 7---- 48, 120
§ 8---- 48, 120
§ 9---- 49, 121
§ 10---- 121
§ 11---- 121
Act of March 3, 1863, c. 92, 12 Stat. 765:
§ 1---- 51, 122
§ 2---- 122
§ 3---- 50, 51, 123
§ 4---- 123
§ 5---- 50, 124
§ 6---- 124
§ 7---- 50, 124
§ 14---- 7, 52, 53, 54, 55, 56, 95, 97, 125
Act of March 17, 1866, c. 19, § 1, 14 Stat. 9---- 55, 95, 97
Act of March 3, 1883, c. 116, 22 Stat. 485:
§ 1---- 102, 125–126
§ 2---- 102, 126
Act of January 20, 1885, c. 25, 23 Stat. 283---- 103
Act of March 3, 1887, c. 359, 24 Stat. 505 (Tucker Act)---- 8, 59
§ 1---- 57, 92, 126
§ 2---- 58, 127
Act of June 18, 1910, c. 309, § 1, 36 Stat. 539---- 60
Act of March 3, 1911, c. 231, 36 Stat. 1087---- 8, 58, 59, 100
Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219---- 60
Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842 (Federal Tort Claims Act)---- 8
§ 410---- 128
§ 412(a)(1)---- 61, 128
§ 412(a)(2)---- 60, 128
Act of July 28, 1953, c. 253, 67 Stat. 226---- 21, 22
§ 1---- 3, 26, 111, 128
§ 8---- 56, 103

Statutes—Continued
Federal—Continued
Page
Act of July 14, 1956, c. 589, § 1, 70 Stat. 532 34
Act of July 9, 1956, 70 Stat. 497 21
Act of August 25, 1958, 72 Stat. 848 21, 28
Federal Tort Claims Act: see Act of August 2, 1946.
Judicial Code of 1911:
§§ 1–135 (36 Stat. 1087–1135) 60
§ 136 (36 Stat. 1135) 101
§§ 136–187 (36 Stat. 1135–1143) 60
§§ 188–255 (36 Stat. 1143–1160) 60
Judiciary Act of 1789, § 11, 1 Stat. 73, 78 12, 77, 85, 86
Revised Statutes, § 1049 101
1 Stat. 324 88
3 Stat. 768 89
6 Stat. 569 89
9 Stat. 788 89
Tucker Act: see Act of March 3, 1887.
28 U.S.C. 171 3, 26, 28, 31, 114
28 U.S.C. 174 104
28 U.S.C. 293(a) 2, 21, 23, 114
28 U.S.C. 456 104
28 U.S.C. 1346(a)(2) 59, 94, 114–115
28 U.S.C. 1346(b) 115
28 U.S.C. 1346(c) 59, 115
28 U.S.C. 1491 92, 115
28 U.S.C. 1492 56, 102, 116
28 U.S.C. (1952 ed.) 1493 103
28 U.S.C. 1503 92, 116
28 U.S.C. 1504 60, 115
28 U.S.C. 2403 3
28 U.S.C. 2509 56, 102, 116
State and colonial:
Connecticut Act of January 1789 (*Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America; holden at New Haven (by Adjournment) on the first Thursday of January 1789* (New London; printed by T. Green and Son), pp. 375–376) 80, 143
Delaware Act of June 5, 1779 (*Laws of the State of Delaware* (1700–1797), printed by Samuel and John Adams, New Castle (1797), vol. 2, pp. 658–659) 80, 143

Statutes—Continued
State and colonial—Continued
Page
D.C. Code, § 31–101 104
Georgia Confiscation Act of 1778 ..... 80, 140
Maryland Act of January 20, 1787 (2 Kilty, *Laws of Maryland*, c. LIII) 80, 139–140
New Jersey Confiscation Act of April 18, 1778 (*Acts of the Council and General Assembly of the State of New Jersey* (1776–1783), compiled by Peter Wilson, Trenton (1784), printed by Isaac Collins, pp. 43–46) 80, 141
North Carolina Confiscation Acts of 1779 and 1781 ..... 80, 141–142
Virginia Act of 1778 (9 Henings, *Statutes at Large*, p. 540) 79, 137
Virginia Act of November, 1781 (10 Henings, *Statutes at Large*, p. 468) 138
English:
33 Henry VIII, c. 39 135
Congressional materials:
Annals of Congress, vol. I, pp. 782–785, 796–833 86
Cong. Globe (33d Cong., 2d sess.), vol. 30:
p. 70 38
p. 71 ..... 38, 39
pp. 71–74 38
p. 72 39
pp. 72–73 40
p. 74 40
pp. 105–106 40
pp. 105–114 38
p. 107 ..... 40, 41
pp. 108–109 42
p. 110 42
p. 111 ..... 42, 43
p. 112 43
p. 113 ..... 43, 44, 45
pp. 113–114 45
p. 114 ..... 45, 46
p. 902 46
Cong. Globe, 37th Cong., 2d sess.:
Appendix, p. 2 49–50
pp. 1672, 1673, 1674, 1675, 1676 51
p. 1675 52

Congressional materials—Continued
Cong. Globe, 37th Cong., 3d sess.: Page
pp. 270–271, 310, 371, 372, 416 ... 51
pp. 303, 399, 419 ... 51
p. 426 ... 51, 55
Cong. Globe, 39th Cong., 1st sess., p. 770 ... 55
99 Cong. Rec. 5020 ... 33
99 Cong. Rec. 8125–8126 ... 31
99 Cong. Rec. 8943–8944 ... 35, 110
Documents Illustrative of the Formation of the Union of the American States, H. Doc. 398, 69th Cong., 1st sess., p. 572 ... 81, 82
Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America, The, H. Doc. 357, 59th Cong., 2d sess., vol. 1, pp. 568, 569 ... 79–80, 142
H.R. 1070, 83d Cong ... 5, 27, 35
H. Rept. 695, 83d Cong., 1st sess ... 28–30, 31
S. 1349, 83d Cong ... 31–32
S. 2975, 83d Cong ... 34
S. 3131, 83d Cong ... 34
S. 584, 84th Cong ... 34
S. Rept. 261, 83d Cong., 1st sess ... 32, 33
S. Rept. 275, 83d Cong., 1st sess ... 33
S. Rept. 2352, 83d Cong., 2d sess ... 34
S. Rept. 2353, 83d Cong., 2d sess ... 34
S. Rept. 1827, 84th Cong., 2d sess ... 34
Miscellaneous:
2 Beveridge, *Life of Marshall*, p. 177 ... 79, 138
Bl. Comm., iii, 428–429 ... 78, 136
Ehrlich, *Petitions of Right*, 45 L. Q. Rev. 60 (1929) ... 135
Elliot's *Debates* (2d ed.):
Vol I ... 147
Vol. III ... 145, 146, 148
Federalist, The, No. 81 ... 81, 144
Holdsworth, *History of English Law*, Vol. IX ... 130–137
Plucknett, *A Concise History of the Common Law* (3d ed.), p. 158 ... 135
Revolutionary Records of the State of Georgia (compiled by Allen D. Candler, Atlanta, 1908):
Vol. 1, pp. 334, 341–342 ... 80, 140
Vol. 3, p. 409 ... 80, 140
State Records of North Carolina, edited by Walter Clark, Goldsboro, N.C. (1905), vol. 24, pp. 212, 398 ... 80, 142
Warren, *The Making of the Constitution* ... 81, 82

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, ETC., PETITIONER

v.

OLGA ZDANOK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 2–10) and dissenting (R. 11–12) opinions of the court of appeals are reported at 288 F. 2d 99.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1961 (R. 13). Petitions for rehearing and for rehearing in banc were denied on April 24, 1961 (R. 14–15). The petition for a writ of certiorari was filed on July 21, 1961, and granted on October 9, 1961 (R. 15).

QUESTION PRESENTED

The order granting certiorari limited the writ to question (d) presented by the petition. Question (d) reads:

(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?

This question, in our view, comprises the following subsidiary questions:

1. Whether petitioner has standing to challenge, for the first time in this Court, the authority of Judge J. Warren Madden, a judge of the Court of Claims, who pursuant to designation and assignment participated in the consideration and decision of the appeal in petitioner's case in the Court of Appeals for the Second Circuit.

2. Whether, assuming the Court of Claims to be a "legislative" court, its judges can be constitutionally authorized by Congress to serve on the courts of appeals.

3. Whether the Court of Claims is and has been a court created under Article III of the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in Appendix A, *infra*, pp. 113–129.

STATEMENT

On March 28, 1961, a divided panel of the United States Court of Appeals for the Second Circuit, consisting of two regular judges of that court (Chief Judge Lumbard and Judge Waterman) and Judge J. Warren Madden, a regular member of the United States Court of Claims, sitting by designation,[1] re-

[1] The designation, made by the Chief Justice under the authority of 28 U.S.C. 293(a) (Appendix A, *infra*, p. 114), appears at page 8a of the Appendix to the brief of petitioner.

versed a judgment for petitioner rendered by the District Court for the Southern District of New York (185 F. Supp. 441) in a suit for damages for breach of contract brought by respondents, members of a labor union (R. 1–13).[2] Judge Madden wrote the majority opinion (R. 2–10) and Chief Judge Lumbard dissented (R. 11–12).

Following denial by the court of appeals of petitions for rehearing and for rehearing in banc which did not raise the issue of Judge Madden's participation (R. 14–15), petitioner filed in this Court a petition for a writ of certiorari, question (d) of which was whether the participation by a Court of Claims judge in the judgment of the court of appeals "vitiate[d] the judgment" (R. 15). The petition challenged the constitutionality of the Act of July 28, 1953, c. 253, § 1, 67 Stat. 226 (Appendix A, *infra,* pp. 128–129), which amended Section 171 of Title 28 of the United States Code (the Code provision establishing the Court of Claims (Appendix A, *infra,* p. 114)) by declaring that court to be a court established under Article III of the Constitution (see *infra,* pp. 21, 26–36). On October 9, 1961, this Court granted certiorari, limiting the writ to question (d), and, pursuant to 28 U.S.C. 2403, certified to the Attorney General that the constitutionality of the 1953 Act, *supra,* was drawn in question (R. 15–16). The government thereafter filed a petition for leave to intervene, which was granted by the Court on October 23, 1961.

---

[2] The suit, originally brought in a New York state court, was removed to the district court on the basis of diversity of citizenship. The merits of the controversy have no present relevance.

SUMMARY OF ARGUMENT

I

Judge Madden was at least a *de facto* judge of the court of appeals, and petitioner cannot challenge his authority for the first time in its petition for certiorari.

There can be no question that the *office* which Judge Madden held during the appeal of petitioner's case to the Second Circuit—the office of circuit judge of the Court of Appeals for the Second Circuit—is a lawful or *de jure* one. The designation of Judge Madden by the Chief Justice to sit on the court of appeals was regularly made in accordance with statutory authority. The rule is well settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least, once the judge has performed his judicial functions) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. (See the government's brief in *Lurk* v. *United States,* No. 481, this Term, at pp. 5–8, 27–39).

II

Judge Madden is, and was in 1961 (when he sat in petitioner's case), an Article III *judge,* fully competent to sit on the court of appeals or any Article III court to which he might be assigned pursuant to statute. He has life tenure and performs judicial duties. The provision of the 1953 Act that the Court

of Claims "is hereby declared to be a court established under article III of the Constitution" means, at the least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, since the 1953 statute those judges have been Article III judges in the same category as the judges appointed to the ordinary Article III courts. No difficulty is raised by the fact that Judge Madden may also be called to sit in a "legislative" court (if the Court of Claims be deemed such). See the government's brief in *Lurk* v. *United States,* No. 481, this Term, at pp. 9–12, 43–51.

III

The Court of Claims was validly created by Congress as an Article III court.

A. Congress desired by the 1953 Act to repudiate, so far as constitutionally possible, this Court's interpretation in *Ex parte Bakelite Corporation,* 279 U.S. 438, and *Williams* v. *United States,* 289 U.S. 553, of the power Congress exercised in establishing the Court of Claims, and to declare authoritatively that it acted under Article III.

1. The language of the amendment shows that its purpose was, not to make the court an Article III court, but to declare that it was already such.

2. The legislative history confirms this aim.

a. The report of the House Judiciary Committee accompanying H.R. 1070, 83d Congress (the bill which became the 1953 Act) expressly stated that it was the purpose of the bill to reject the *Bakelite* and *Williams*

decisions and to declare unequivocally that the Court of Claims "was in fact established as, and continues to be, a constitutional court."

b. Although there is language in the report (and a "corrected" report) of the Senate Judiciary Committee, accompanying a companion Senate bill, which would suggest that it was the purpose of the bill to "make" the court an Article III court, and although some of the remarks made during the Senate debates were of a like tenor, the statements in question, when read in context, are consistent with the view that the purpose of the Senate bill was likewise declaratory. The substitution in the "corrected" report of the statement that the committee "is of the opinion that Congress intended it [the Court of Claims] to have been so created [*i.e.*, under Article III]" for the statement that the committee "is of the opinion that it more properly should have been so created" shows that the committee desired to express its disagreement with the *Williams* decision on this point, and confirms the declaratory purpose of the Senate bill. Moreover, the House bill (the declaratory purpose of which was clear) was substituted for the Senate bill during the Senate debates, and was the one enacted.

B. Apart from the 1953 declaration, there exist strong historical grounds for holding that the *Bakelite* and *Williams* cases erred in ruling that the Court of Claims was not an Article III court.

1. Congress intended the Court of Claims to be an Article III court.

a. The court was created by the Act of February 24, 1855. It was given the power to "hear and deter-

mine all claims [against the United States] founded upon any law of Congress, or upon any regulation of an executive department or upon any contract, express or implied, with the government of the United States." Its judges have had life tenure from the beginning. Its decisions, however, did not originally have finality; in the beginning the court was limited to preparing bills for congressional enactment giving effect to its judgments (where favorable to the claimants). With the exception of this lack of finality (a bar to Article III status which was soon removed), the court had all the attributes of an Article III tribunal, and the debates in Congress reflect that it was the legislative intent to establish the court in the exercise of Article III authority. The debates revolved principally around the question whether the body to be established would be a "court of claims" or a "board of commissioners". It was assumed by all that, if the advocates of a "court" prevailed, the judges of the court would be required by Article III to hold tenure during good behavior. The advocates of a "court" did prevail and the Act explicitly provided for life tenure.

b. When it became apparent, soon after the creation of the court, that the congressional objective was being defeated by the lack of finality in the court's decisions, Congress, in 1863, attempted to give finality to the court's judgments, subject to a limited right of review by this Court. A clause of the 1863 Act (§ 14), providing that no money should be paid out of the Treasury for any claim passed upon by the court until

after an appropriation therefor had been "estimated for by the Secretary of the Treasury," was held by this Court in *Gordon* v. *United States,* 2 Wall. 561, 117 U.S. 697, to be a bar to review by this Court because of the continuing impediment to finality which this Court thought the clause presented. Shortly following this decision (in 1866), the clause was repealed, and thereafter this Court took appeals without question from the judgments of the Court of Claims. Thus, insofar as Congress was able to do so, it finally committed the determination of claims against the United States to the judiciary, and established the Court of Claims as a national tribunal for the hearing and decision of such claims, subject only to review by this Court. The court then became an Article III tribunal.

c. The vesting of concurrent jurisdiction of claims against the United States (up to certain amounts) in the regular federal courts (circuit and district) by the Tucker Act of 1887 further evidenced Congress's understanding of the Article III status of the Court of Claims.

d.–e. Congress's treatment of the Court of Claims as an integral part of the federal judicial establishment in the Judicial Code of 1911 further indicated its understanding of the court's Article III status. And in 1946, in the Federal Tort Claims Act, Congress gave the Court of Claims appellate jurisdiction (concurrent with the courts of appeals) to review district court judgments under that Act.

2. From 1866 to 1929 this Court uniformly assumed, and repeatedly declared, the Court of Claims

to be an Article III tribunal. *United States* v. *Klein,* 13 Wall. 128, 144–145 (1871); *United States* v. *Union Pacific Railroad Co.,* 98 U.S. 569, 603 (1878); *United States* v. *Louisiana,* 123 U.S. 32, 35 (1887); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384, 386 (1902); *Kansas* v. *United States,* 204 U.S. 331, 342 (1907); *Miles* v. *Graham,* 268 U.S. 501 (1925).

3. *a.* In 1929, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite Corporation,* 279 U.S. 438, held that the Court of Customs and Patent Appeals was a "legislative court" created by Congress under its Article I power to lay and collect duties on imports, and that it derived none of its authority from Article III. That court was declared to be a "special tribunal" created "to examine and determine various matters * * * which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451), and it was held that such a tribunal could not be an Article III court. The Court, in a *dictum,* said that the Court of Claims was likewise in this category. But the cases cited in the opinion for the proposition that a court established to determine matters susceptible of but not requiring judicial determination may not be a constitutional court do not support it. And no reason grounded in policy or logic can be suggested for that view. The fact that a court's business consists exclusively of matters which *need* not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. The important con-

sideration is that the matters were in fact committed to judicial determination, and that the court's decisions are final and not revisable by the executive or legislative branch. Various matters have, historically, been submitted to constitutional courts although they could have been determined non-judicially, as the *Bakelite* opinion inferentially recognized. The creation of special Article III courts to exercise particular types of jurisdiction is not foreign to our history, and this Court has indicated that nothing in the Constitution prevents Congress from limiting the jurisdiction of the inferior tribunals established under Article III.

b. In *Williams* v. *United States,* 289 U.S. 553 (1933), the *Bakelite dictum* as to the character of the Court of Claims ripened into a holding. It was held that the judges of the Court of Claims, because the court was not an Article III tribunal, lacked the protection afforded by Article III against salary diminution during continuance in office. The Court conceded that the Court of Claims "undoubtedly * * * exercises judicial power," and that on several occasions prior to the *Bakelite* case it had declared the Court of Claims to be an Article III court. It adhered, however, to its more recent *dictum* in the *Bakelite* case and the rationale underlying it.

A second basis of the *Williams* decision—one not considered in *Ex parte Bakelite*—was that "Controversies to which the United States shall be a Party" (as used in Article III) do not include suits *against* the United States because so to construe the phrase would be inconsistent with the principle of sovereign

immunity. This rationale, in addition to being opposed to the Court's own prior pronouncements is, we submit, unsound in principle and contrary to the clear intent of the framers of the Constitution.

4. The flaw in the Court's reasoning is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the correct premise that the phrase "Controversies to which the United States shall be a Party" was not intended as a blanket consent by the sovereign to be sued, the Court incorrectly concluded that this prevented application of the provision even where consent had been given by Congress.

a. While the doctrine of sovereign immunity was a "well settled and understood" rule at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

b. The waiver of sovereign immunity was thus a common practice in Anglo-American law at the time of the adoption of the Constitution. Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "Controversies to which the United States shall be a Party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff. Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. The views of Marshall, Madison, and Hamil-

ton, referred to in the *Williams* opinion, were addressed solely to the question whether there had been a surrender by the States of their immunity to suit "in the plan of the convention." Their denial that there had been such a surrender was not meant to suggest that suits against the government, with the consent of the government, would not be embraced within Article III. In fact, in the Virginia debates on the Constitution, both Madison and Marshall expressly acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State * * * and foreign States * * *." See *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 323–324.

c. Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 is authority for, rather than against, the view that Article III extends the judicial power to suits against the United States. That Act gave the circuit courts jurisdiction of civil suits where the matter in dispute exceeded $500 "and the United States are plaintiffs, or petitioners." The statute and its history contradict the suggestion, implicit in *Williams*, that Congress intended by the Act to vest in the circuit courts all the judicial power (with respect to "Controversies to which the United States shall be a Party") which Article III confers. The limitation of the authority conferred by the statute to suits by the United States shows merely that the statute was not intended to exhaust the judicial power

conferred in Article III, and that it was not meant to operate as a consent to suit.

d. Less than five years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the federal circuit courts, assumed that suits against the United States (on pension claims, sovereign immunity having been waived) were cognizable in those courts if the requirement of judicial finality was met. *Hayburn's Case,* 2 Dall. 409 (1792). This was also the assumption of *United States* v. *Ferreira,* 13 How. 40 (1851).

5. A question not considered in the *Williams* opinion is whether cases heard by the Court of Claims do not fall within the "federal question" jurisdiction defined in Article III ("Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *"). We believe the issues the court decides come under this category as well. This is so even with respect to claims based on contract, since all federal contracts must stem from some congressional authority. To the extent that the power of the court extends to the adjudication of claims founded on the Constitution, any Act of Congress, or any regulation of an executive department, there can be no doubt on the point. The fact that this Court has regularly granted review of Court of Claims judgments since its decisions were given finality in 1866, and in particular has granted review since *Williams* was decided, shows that this Court has considered that these cases present federal question issues within the scope of Article III. In addition, the same authority exercised by the Court of Claims is also

exercised by the district courts (subject to a $10,000 limitation). It would be incongruous to suppose that such claims involve "federal question" issues in the district courts but not in the Court of Claims.

C. Doubt as to the nature of the Court of Claims should be resolved in favor of its Article III genesis, in the light of Congress's 1953 declaration. This Court should accord great weight to a formal and authoritative declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the court into being.

D. There is no constitutional obstacle to the conclusion that the Court of Claims was validly established by Congress under Article III.

1. That the Court of Claims lacked the power to render final judgments prior to 1866 is consistent with the view that it acquired Article III status when, in that year, that power was given to it.

a. This Court saw no constitutional difficulty with this conclusion when, in *United States* v. *Klein,* 13 Wall. 128, 144–145, it observed that the Court of Claims, though originally a court "merely in name," was, after 1866, "one of those inferior courts which Congress authorizes."

b. The transition of the court to Article III status in 1866 did not require reappointment and reconfirmation of the incumbent judges. As a result of the transition, Congress gave up its power to reduce the judges' tenure and diminish their compensation, but Congress has often made far more drastic alterations in the tenure or compensation of incumbent officials

without encroaching upon the Presidential power of appointment.

c. If it be assumed that the transition of the court to Article III status could not be effected without giving the President the right to reappoint the incumbent judges or to make new appointments, and the Senate the right to approve or reject the nominees, those rights were waived. In any case, the only judges about whose tenures even a theoretical question could arise were those sitting on the effective date of the 1866 Act.

d. If the court did not become an Article III tribunal in 1866, it became one in 1911 when it was reconstituted by the Judicial Code. At that time, this Court had repeatedly declared that the Court of Claims was an Article III tribunal, and Congress, in reenacting the organic legislation establishing the court, must be presumed to have intended to adopt the then settled view as to its character.

2. The vesting in the court of certain non-judicial functions of an essentially advisory nature (its so-called congressional and departmental reference jurisdiction—only the former of which it still retains) did not affect its Article III status.

a. The granting of these special advisory functions to the court could not have impaired its constitutional character as a tribunal deriving its authority from Article III if, as we maintain, it had that status previously.

b. But we do not believe that the vesting of these additional functions was inconsistent with the court's Article III nature. *O'Donoghue* v. *United States,* 289

U.S. 516, indicates that the possession by a federal court of some powers and functions not judicial in character is compatible with its status as an Article III court. That decision, holding the superior courts of the District of Columbia to have been established under Article III, recognized the authority of Congress, under its plenary power to legislate for the District, to vest in the courts of the District, in addition to their Article III judicial functions, administrative and legislative functions. The rationale of the *O'Donoghue* case is equally applicable to the Court of Claims. That court has its headquarters at the seat of government, within the area over which Congress possesses exclusive power to legislate. Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the courts of the District, constitutionally vest similar powers in the Court of Claims, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept. It is true that the functions of the Court of Claims are national in scope and that its jurisdictional subject matter and area of interest are in no sense confined to the geographical limits of the District of Columbia. But it is also true that neither the judicial nor the non-judicial functions of the ordinary superior courts of the District are limited to matters of concern only to the District.

In addition, we suggest that Congress may properly draw upon its other Article I powers in adding certain non-judicial functions to the Court of Claims. The plenary power of Congress "to pay the Debts * * * of the United States" (Article I, Section 8,

clause 1) sustains the establishment of such non-judicial machinery. This Court and individual justices have rejected, in general terms, the exercise by federal courts, other than the District of Columbia courts, of non-judicial functions. But the Court's concern for the nationwide federal court system suggests that there well may be a difference, with respect to joinder of non-judicial with judicial functions, between the regular federal courts and the special constitutional tribunals. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment apply with less force to the specialized tribunals with their limited functions and areas of responsibility. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and certain non-judicial functions pertaining to matters falling within the field of its judicial competence.

IV

If the Court, adhering to its *Williams* decision, should hold that the congressional assumption underlying the declaration in the 1953 Act—that the Court of Claims already was an Article III court—is insupportable on historical or other grounds, the Act should be given at least prospective effect—that is, the court should be held to have been made an Article III tribunal by that Act. Cf. *Postmaster-General* v. *Early*, 12 Wheat. 136, 148–149. We believe there are no valid constitutional objections to such an interpretation of the 1953 Act (see *supra*, pp. 14–17).

ARGUMENT

INTRODUCTION

In 1929, in an extended *dictum* in *Ex parte Bakelite Corporation,* 279 U.S. 438, 451–455, this Court declared the Court of Claims to be a legislative court, created by Congress pursuant to its power under Article I of the Constitution to pay the debts of the United States,[3] and not one of the courts, inferior to this Court, which Article III, Section 1[4] authorizes Congress from time to time to ordain and establish, and in which (and in this Court) is vested "[t]he judicial Power of the United States."[5] The principal rationale of the Court's conclusion was that the Court of Claims was created and had been maintained "as a special tribunal to examine and determine claims for money against the United States"; that this was a function which, though "susceptible of determination by courts," also admits of "legislative or executive determination"; that Congress, as a consequence, need never have established a court to discharge this function, but could have reserved to itself the power

---

[3] Article I, Section 8, clause 1 (Appendix A, *infra*, p. 113).

[4] Appendix A, *infra*, p. 113.

[5] The court directly involved in the *Bakelite* case was the Court of Customs and Patent Appeals, which the decision held to be a legislative court, similar in character to the Court of Claims and certain other courts discussed in the opinion. In our brief in *Lurk* v. *United States*, No. 481, this Term (to be argued immediately before this case), we urge that the Court of Customs and Patent Appeals was created as, and has always been, a court established under Article III, and that the *Bakelite* decision, in holding to the contrary, reached an erroneous conclusion from mistaken premises and failed to take adequately into account the pertinent historical materials.

to pass upon such claims, or committed them to the determination of executive departments (as Congress in fact had done for some sixty-five years following the adoption of the Constitution); and that courts which have been

> created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it

are necessarily legislative courts, and cannot have been established under the regular court-creating authority vested in Congress by the Judiciary Article (279 U.S. at 451–452).

Four years later, the views expressed in the *Bakelite* case as to the nature of the Court of Claims ripened into an explicit holding that the court was a legislative and not an Article III tribunal—with the consequence, the Court held, that its judges did not enjoy the protection against salary reduction during continuance in office which Article III guarantees to the judges of courts established by or under that article. *Williams* v. *United States,* 289 U.S. 553. In a decision rendered the same day, the Court reached the opposite conclusion as to the superior courts of the District of Columbia (*O'Donoghue* v. *United States,* 289 U.S. 516)—though in so doing it was required to repudiate *dictum* to the contrary in the *Bakelite* case (289 U.S. at 550; 279 U.S. at 450, 460).

The Court, in *Williams,* acknowledged that the Court of Claims "undoubtedly * * * exercises judicial power" (289 U.S. at 565), and conceded that

the power it exercises comes literally within the scope of one of the heads of judicial power defined in Article III, *viz.*, "Controversies to which the United States shall be a Party" [6] (289 U.S. at 573). It held, however, that (*ibid.*)—

> in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought *against* the United States. [Emphasis added.]

The Court thought it a necessary consequence of the doctrine of sovereign immunity that the phrase "Controversies to which the United States shall be a Party" in Article III had to be understood as though it read "Controversies to which the United States shall be a Party *plaintiff*"—with the result that, since the United States is the *defendant* in the claims proceedings heard by the Court of Claims, the controversies decided by that court fall outside the scope of the Article III phrase and do not involve the "judicial power of the United States" as defined in that article (289 U.S. at 571–578).

In the *Williams* case the government, largely on the authority of the opinion in *Ex parte Bakelite,*[7] had argued that the Court of Claims was a legislative court. Brief for the United States, Nos. 728, 729, and 730, October Term, 1932, pp. 4–10. In 1944, in *Pope* v. *United States,* 323 U.S. 1, the government reversed its position on the basis of a more thorough

[6] Article III, Section 2 (Appendix A, *infra*, pp. 113–114).

[7] In *Bakelite*, the Solicitor General had argued that the Court of Customs and Patent Appeals is an Article III court.

study of the pertinent historical materials and argued that the Court of Claims was an Article III court. Brief for the United States, No. 26, October Term, 1944, pp. 60–103. It contended that the *Williams* decision should be overruled for the reasons that it was "not [in] accord with prior authority or with constitutional history, * * * based upon a mistaken premise, and * * * rendered without the aid of considerable relevant historical material." *Id.*, p. 61. The Court found it unnecessary, however, to reach the issue. 323 U.S. at 13–14.

In the Act of July 28, 1953, 67 Stat. 226, Congress "declared" the Court of Claims "to be a court established under article III of the Constitution of the United States", and provided that circuit and district judges could be assigned temporarily to sit on the court. By the Acts of July 9, 1956, 70 Stat. 497, and August 25, 1958, 72 Stat. 848, 28 U.S.C. 293, the judges of the Court of Claims were made eligible for temporary assignment to district courts and courts of appeals. In recent years, a number of circuit and district judges, as well as Justices Reed and Burton, have sat upon the Court of Claims, and Judge Madden of the Court of Claims has sat upon the courts of appeals. So far as we are aware, the petition for certiorari in this case was the first challenge to this practice.

Before discussing the fundamental question of the validity of the declaration in the Act of July 28, 1953, that the Court of Claims is established under Article III, we shall argue that (1) Judge Madden was at least a *de facto* judge whose authority cannot first

be challenged in a petition for certiorari to this Court (Point I, *infra,* pp. 23–24), and (2) at least since 1953 Judge Madden has been an Article III judge, constitutionally competent to sit on any Article III court, whatever is or has been the character of the Court of Claims (Point II, *infra,* pp. 25–26).

In Point III, *infra,* pp. 26–107, we shall argue that the Court of Claims is and has been an Article III court, and that the Act of July 28, 1953, merely confirmed that status. The legislative history of the 1953 statute makes clear that Congress intended to repudiate—insofar as it was constitutionally possible for it to do so—this Court's interpretation in the *Williams* decision (and the *dictum* in the *Bakelite* opinion) as to which of its constitutional powers Congress exercised and intended to exercise in establishing the Court of Claims. We shall then show that, apart from the 1953 congressional declaration, there exist strong historical grounds, not adequately taken into consideration by the Court in *Bakelite* and *Williams,* for holding that those cases reached an erroneous conclusion as to the nature of the Court of Claims. The judges of the court have possessed life tenure from the time of the court's creation (in 1855); it has had the power to render final decisions since as long ago as 1866; and at least since the latter date it has been deciding "Controversies to which the United States shall be a Party" and "Cases * * * arising under [the] Constitution [and] * * * Laws of the United States" within the scope of those clauses of the Judiciary Article. We shall then argue that any doubt that might survive as to the court's true nature should

be resolved, in the light of the formal and authoritative 1953 declaration by Congress, as the court's creator, in favor of the court's genesis under Article III.

Finally, we shall contend in Point IV, *infra,* pp. 108–111, that the 1953 Act should at least be given prospective effect, *i.e.,* that the Court of Claims be held to have acquired Article III status as of the date of the Act's enactment.

I

Judge Madden Was At Least A *De Facto* Judge of the Court of Appeals, and Petitioner Cannot Challenge His Authority for the First Time In Its Petition for Certiorari

As in the case of Judge Jackson in the *Lurk* case, No. 481, there can be no question that the *office* which Judge Madden held during the appeal of petitioner's case to the Second Circuit—the office of circuit judge of the Court of Appeals for the Second Circuit—is a lawful or *de jure* one. The assignment of Judge Madden was authorized by a law of Congress, 28 U.S.C. 293(a) (Appendix A, *infra,* p. 114), and his designation by the Chief Justice of the United States to sit on the court of appeals was made under and in accordance with that Act. There is no challenge to the regularity of that designation. Judge Madden, in good faith, filled the office to which he had been assigned and exercised the normal judicial functions incident thereto. Petitioner did not challenge his authority at any time while the case was in the court of appeals, either in the briefs or at the argument of the appeal, or in the petition for rehearing. The

first challenge came in the petition for certiorari. In the circumstances, we submit that Judge Madden was, at the least, a *de facto* judge whose title to office is not subject to attack by the petitioner in this Court.

As we show in more detail in our brief in *Lurk,* No. 481, pp. 27–39, the rule is settled in the federal courts that where a judge, in good faith and under color of authority, is in actual possession and discharging the duties of a *de jure* office, a party litigant has no standing (at least, once the judge has performed his judicial functions) to challenge the title of the judge to hold the office or his exercise of judicial authority, whether he is regularly or temporarily filling the office. *E.g., Ex parte Ward,* 173 U.S. 452; *McDowell* v. *United States,* 159 U.S. 596. This doctrine is grounded upon principles of public policy to avoid the confusion, uncertainty, unfairness, and delay which would result from challenges to the authority of public officers, particularly after they have completed their duties. We know of no federal case which has allowed a litigating party, aware of the facts relating to a possible challenge to a judge's participation, to wait until after he has performed his functions before making the challenge—on appeal or certiorari.

II

Judge Madden Is, and Was in 1961, an Article III Judge, Fully Competent to Sit on Any Article III Court to Which He Might Be Assigned Pursuant to Statutory Authority

Again like Judge Jackson, in the *Lurk* case, No. 481, Judge Madden is (and was in 1961, when he sat in petitioner's case) an Article III *judge* fully competent to sit on the court of appeals of any Article III court to which he might be assigned pursuant to statute. He has all the qualifications of an Article III judge. He has life tenure and performs judicial duties. The provision of the 1953 Act that the Court of Claims "is hereby declared to be a court established under article III of the Constitution of the United States" means, at the very least, that Congress has irrevocably given up whatever power it may have had to reduce the compensation or terminate the appointment of the judges of that court. If they were not such before, those judges have been Article III judges since the 1953 statute, in the same category as the judges appointed to the various district courts and courts of appeals.

No difficulty is raised by the fact that Judge Madden may also be called to sit in a "legislative" court (if the Court of Claims be deemed such). On that

tribunal, his duties would be primarily if not entirely judicial, and the issues with which he would be concerned would arise under the Constitution and laws of the United States. Article III judges may constitutionally exercise judicial power not stemming from Article III, at least so long as it is of the same kind as the power specified in that Article. And Article III *judges* (as distinguished, perhaps, from Article III *courts*) may also validly perform certain nonjudicial functions—as the course of our history proves. Under our view, the judges of the Court of Claims would remain Article III judges even if Congress abolished the court and ended or transferred its functions. See *Donegan* v. *Dyson,* 269 U.S. 49 (Commerce Court judge).

For a further discussion of this point, the Court is respectfully referred to our brief in the companion *Lurk* case, No. 481, at pp. 43–51.

III

The Court of Claims Was Validly Created by Congress as an Article III Court

A. *Congress intended by the 1953 Act to repudiate, so far as constitutionally possible, this Court's interpretation in the* Bakelite *and* Williams *cases as to what power Congress exercised in establishing the Court of Claims, and to declare authoritatively that it acted under Article III*

Section 1 of the 1953 Act (Appendix A, *infra,* pp. 128–129) amended Section 171 of Title 28 of the United States Code (the Code section providing for the Court

of Claims, see Appendix A, *infra,* p. 114) by adding, after the words

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims

a new sentence, reading:

> Such court is hereby declared to be a court established under article III of the Constitution of the United States.

1. The language of the amendment shows that its purpose was, not to *make* the Court of Claims an Article III court, but to declare that it *was* such a court. The aim was not to change the character of the court from a legislative court to one established under Article III, but to declare that it had in fact been established under that article. Congress formally and authoritatively declared, through an amendment of the organic act creating the court, that in bringing the court into being it had exercised its power under Article III to create inferior federal courts.

2. The legislative history of the measure shows that it was Congress's purpose to repudiate, so far as it constitutionally might, this Court's interpretation in the *Bakelite* and *Williams* cases of the power Congress exercised and intended to exercise in establishing the court, and to declare that it had exerted its power under the Judiciary Article to ordain and establish federal tribunals inferior to this Court.

a. The bill which became the 1953 Act was H.R. 1070, 83d Congress. The House Judiciary Committee,

in reporting it out, described the "principal purpose" of the bill as follows (H. Rept. 695, 83d Cong., 1st sess., p. 2): [8]

> The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court,[9] the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient. * * *

[8] Portions of this report are also quoted in our *Lurk* brief, No. 481, at pp. 55–56, since the legislative history of the Act of August 25, 1958, there considered (adding to the Code provision establishing the Court of Customs and Patent Appeals the same language which the 1953 Act added to 28 U.S.C. 171), shows that Congress sought to accomplish with respect to the Court of Customs and Patent Appeals, in 1958, the same objective which it sought to effect in 1953 for the Court of Claims.

[9] The decisions referred to were cited and quoted from at a later point in the report (p. 4). See *infra*, p. 30.

Referring to Section 1 of the bill—the section which added the declaratory language to the charter of the court—the report stated (p. 3):

> * * * Need for this declaration arises from the decision of the Supreme Court in 1933 in the case of *Williams* v. *United States* (289 U.S. 553), which held that the Court of Claims was not one of the inferior courts established by Congress under article III of the Constitution, but rather was created by Congress as a "legislative court" in the exercise of congressional power, under article I, to pay the debts of the United States. Section 1 of the bill should remove any doubt that the Court of Claims is a constitutional court.

The report declared the committee's disagreement with the assumption of the *Williams* case (see *supra,* pp. 19–20, 28) that "Controversies to which the United States shall be a Party," as the phrase is used in Article III, do not include controversies to which the United States is a party *defendant.* It said (p. 3):

> Congress was possessed of two powers under which it might have created the Court of Claims, and it would seem appropriate for it to say which of the powers it was intending to exercise. The Williams case held that in the creation of the Court of Claims Congress was exercising the power granted by article I to pay the debts of the United States. On the other hand, article III provides that—
>
> > The judicial Power of the United States shall extend * * * to Controversies to which the United States shall be a Party. * * *

> The United States is a party in all cases in the Court of Claims. It would seem, therefore, that the Court of Claims exercises the judicial power thus defined in article III and is one of the inferior courts which Congress is empowered to create under that article.

After referring briefly to the legislative history of the 1855 Act under which the Court of Claims was created (see *infra,* pp. 37–49) and concluding that it "seem[ed] certain that Congress, when it established the Court of Claims in 185[5], intended to create a court under article III"[10] (p. 3), the committee pointed out that, until 1929, this Court itself had been of the view that the Court of Claims was an Article III court (pp. 3–4). Substantiating passages were quoted from several pre-1929 opinions (p. 4).[11]

"The first intimation that the Supreme Court had any thought of deviating from this unbroken line of cases," the report went on (p. 5), "was contained in *Ex parte Bakelite Corporation* (279 U.S. 438), decided in 1929, just 4 years after *Miles* v. *Graham*

---

[10] See, however, on this point, pp. 49–56, *infra.*

[11] These were: *United States* v. *Klein*, 13 Wall. 128, 145; *United States* v. *Union Pacific Railroad Co.*, 98 U.S. 569, 603–604; *United States* v. *Louisiana*, 123 U.S. 32, 35; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 384, 386; *Kansas* v. *United States*, 204 U.S. 331, 342. In addition, the report cited this Court's decision in *Miles* v. *Graham*, 268 U.S. 501 (1925), holding the salary of a judge of the Court of Claims to be immune to taxation (because of the then prevailing rule that taxing judges' salaries was forbidden by the prohibition of Article III, Section 1, against diminishing their compensation during their continuance in office). As noted in the report (p. 4), the decision assumed that the Court of Claims was an Article III court. We discuss these cases *infra*, pp. 61–65.

[268 U.S. 501]."[12] Following a critique of the rationale of the *Bakelite dictum* relating to the Court of Claims, some further discussion of the *Williams* decision, and a reference to the fact that the Department of Justice, in the *Pope* case, had reversed the position it had taken as to the nature of the Court of Claims in the *Williams* case (*supra,* pp. 20–21), the report concluded its discussion of Section 1 of the bill by stating (p. 5):

> In view of this uncertainty and difference of opinion it would certainly seem proper for the body which created the Court of Claims to declare whether, in the creation of it, Congress intended to exercise article I or article III power.

The House report thus leaves no room for doubt that it was the purpose of the House bill (which became the 1953 Act) to declare that the Court of Claims then was, and historically had been, an Article III court—not to transform it into such a court. The bill was passed by the House without debate. 99 Cong. Rec. 8125–8126.

b. A companion Senate bill, S. 1349, was similar to the House bill except that, instead of adding the statement

> Such court is hereby declared to be a court established under article III of the Constitution of the United States

to Section 171 of Title 28 as a separate sentence, it proposed to amend the section so as to make it read, in a single sentence:

---

[12] See, as to *Miles* v. *Graham*, note 11, *supra*, p. 30.

> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record *established under article III of the Constitution of the United States and* known as the United States Court of Claims.[13]

The report of the Senate Judiciary Committee which originally accompanied this bill (S. Rept. 261, 83d Cong., 1st sess.), in explaining the bill's purpose, stated in relevant part (p. 2):

> The United States Court of Claims, as it now exists, is a legislative court. This was decided in the case of *Williams* v. *United States* (289 U.S. 553). There are two classes of United States courts, one class being termed "constitutional courts" meaning those established under article III of the Constitution, and the other class being termed "legislative courts" being those not established under said article III of the Constitution. In the Williams case the Court ruled that Congress created the Court of Claims under the power granted by article I of the Constitution.
>
> The fact that the Court of Claims is not a "constitutional court" raises many complications. Said court handles a class of cases which very properly should fall under the judicial power of the United States as provided in article III, which provides that such judicial power "* * * shall extend * * * to controversies to which the United States shall be a party." Every case filed in the Court of

[13] See S. Rept. 261, 83d Cong., 1st sess., p. 3, on S. 1349. The italicized words were proposed to be added to the section by the Senate bill.

> Claims is a case wherein the United States is a party defendant. There appears to be no doubt but that the Court of Claims could, therefore, have been created under said article III. The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end. This change in status of the court would have many far-reaching effects, not the least of which would permit the assignment by the Chief Justice of the United States of circuit and district judges to serve as judges of the Court of Claims when called upon so to do by the chief justice of the Court of Claims. There has been substantial doubt as to whether or not circuit and district judges could be assigned to the Court of Claims and a much more serious doubt as to whether judges of the Court of Claims could legally be assigned to either the district or circuit bench. All such doubt will be removed by the passage of this act.

A "corrected report" (S. Rept. 275, 83d Cong., 1st sess.) was later substituted for the original report. 99 Cong. Rec. 5020. The corrected report (p. 2) substituted for the sentence (in the original report)

> The committee is of the opinion that it more properly should have been so created, and this bill accomplishes this end

the following:

> The committee is of the opinion that Congress intended it to have been so created, and this bill accomplishes this end.

It is evident from the context, we believe, that the statement "The United States Court of Claims, as it

now exists, is a legislative court", appearing in both the original and corrected versions of the Senate report, meant only that the Court of Claims had been held to be such a tribunal by this Court in the *Williams* case, which the committee cited as authority for the proposition. The committee did not intend to suggest, we think, that it agreed with the *Williams* holding. On the contrary, the committee's substitution in the corrected report of the statement "The committee is of the opinion that Congress intended it to have been so created [*i.e.*, under Article III]," for the statement "The committee is of the opinion that it more properly should have been so created," shows that the committee desired to express its disagreement with the *Williams* decision on this point.[14] The fact that both the original and corrected versions referred to a "change in status" which the Court of Claims would undergo if the bill became law is not

[14] It is true that in subsequent reports on cognate bills—S. Rept. 2352, 83d Cong., 2d sess., p. 2, on S. 2975 (a bill introduced in the Eighty-third Congress to declare the Customs Court to be an Article III court, but which was passed over), S. Rept. 2353, 83d Cong., 2d sess., p. 2, on S. 3131 (a bill introduced in the same Congress to declare the Court of Customs and Patent Appeals to be an Article III court, but which was likewise passed over), and S. Rept. 1827, 84th Cong., 2d sess., p. 2, on S. 584 (the bill which became the Act of July 14, 1956, c. 589, § 1, 70 Stat. 532, declaring the Customs Court to be an Article III court)—the substance of the language of the original Senate report, *supra* ("The committee is of the opinion that it more properly should have been so created * * *"), continued to be used. It would appear, in the light of the committee's action in changing this language in the manner indicated in the "corrected" report referred to above, that the committee's failure to make corresponding changes in the later reports was an oversight.

inconsistent with this conclusion. There would be a "change" from the holding of *Williams* that the court was a legislative court. For these reasons, the Senate report is, in our view, not essentially dissimilar from the House report, which as we have seen leaves no doubt as to the declaratory purpose of the legislation.

When the Senate bill came up for debate, Senator Gore requested that the House bill, H.R. 1070, be substituted for it. 99 Cong. Rec. 8943–8944. He explained that he thought the language of the Senate bill (see *supra,* pp. 31–32) was susceptible to the interpretation that Congress was creating a new court, whereas the House bill was not open to such an inference. *Id.,* 8943. Senator McCarran, the chairman of the Judiciary Committee, interposed no objection to the substitution of the House bill, which was thereupon passed. *Id.,* 8944. While some of the language used by Senators Gore and McCarran in their brief references to the two bills would suggest that the purpose of the bills was to "make" the Court of Claims an Article III court rather than to "declare" it to be one,[15] we think, again, that their remarks, when read in context, do not conflict with the essentially declaratory intent of the proposed legislation. In the light of the clear purpose of the legislation as reflected by the committee reports (par-

---

[15] *E.g.,* Senator Gore said that he had some doubts as to the "wisdom of making the Court of Claims an article III constitutional court" (99 Cong. Rec. 8943), and Senator McCarran remarked, in reply to an argument made by Senator Gore, that he was "only taking issue with the suggestion that we cannot make the United States Court of Claims an article III court" (*id.,* 8944).

ticularly the House report, *supra,* which accompanied the bill that actually became law) and the language of the Act itself, the Senators' references to the bills' "making" the Court of Claims a constitutional court involved no more, we think, than an imprecise use of language.[16]

c. The subsequent action of Congress in declaring the Customs Court and the Court of Customs and Patent Appeals to be courts established under Article III (in 1956 and 1958, respectively) further confirms the declaratory objective of the 1953 Act as to the Court of Claims. See our *Lurk* brief, pp. 58–60.

B. *Apart from the 1953 declaration, there exist strong historical grounds for holding that the* Bakelite *and* Williams *cases erred in ruling that the Court of Claims was not an Article III court* [17]

1. CONGRESS INTENDED THE COURT OF CLAIMS TO BE AN ARTICLE III COURT

This Court has said that whether a court is legislative or constitutional does not depend upon "the intention of Congress." *Ex parte Bakelite,* 279 U.S. 438, 459. This means, we believe, only that Congress's *characterization* of a court as "legislative" or "constitutional" is not controlling. The Court did not say that it was irrelevant what *power* Congress consid-

[16] Cf. the remarks of Senator Talmadge and Representative Keating, made with reference to the legislation which declared the Court of Customs and Patent Appeals to be an Article III tribunal, referred to in our *Lurk* brief, No. 481, at p. 60, note. 32.

[17] Substantial portions of the government's brief in *Pope* v. *United States*, 323 U.S. 1, No. 26, Oct. Term 1944, are repeated under this heading.

ered itself to be exercising; on the contrary, the same sentence of the *Bakelite* opinion declares that "the true test lies in the *power under which the court was created* and in the jurisdiction conferred" (emphasis added). At all events, the power which Congress intended to exercise is a highly relevant consideration in determining what power it did exercise in creating a court.

We review in some detail the relevant history of the Court of Claims. Although the court as originally constituted (in 1855) lacked the authority to render final judgments, its judges have always possessed life tenure—one of the hallmarks of an Article III tribunal—and the power to render final judgments was added at a relatively early date.[18] With the addition of the latter power, the court became a full-fledged Article III tribunal, hearing and determining "Controversies to which the United States shall be a Party" within the intendment of the Judiciary Article—as this Court, beginning in 1866, uniformly assumed and repeatedly declared for more than sixty years (*infra,* pp. 55–56, 61–65).

a. THE COURT OF CLAIMS AS ORIGINALLY CONSTITUTED

i. The debates in Congress

The middle of the nineteenth century saw mounting dissatisfaction with the treatment accorded claims against the United States. These were heard and passed on individually by Congress and disposed of by special act. The pressure of business resulted in

[18] By amendments enacted in 1863 and 1866 (see *infra*, pp. 49–56).

many claims being neglected, while those accorded satisfaction obtained it more often through influence than merit.

On December 18, 1854, Senator Brodhead reported from the Senate Committee on Claims a bill "to establish a board of commissioners for the examination and adjustment of private claims." Cong. Globe (33d Cong., 2d sess.), vol. 30, p. 70. The bill proposed the appointment of a board of three commissioners, to whom all petitions to Congress asking relief on account of any claim against the United States would be referred. *Id.*, p. 71. The board was to be "in the nature of a judicial tribunal," with power to take testimony on behalf of the government, but its decisions were not to be final. *Ibid.* It was to "get at and report the facts of each case," so as to enable Congress "to render speedy justice to honest claimants." *Ibid.*[19]

In the course of extensive debates (*id.*, pp. 71–74, 105–114), it became apparent that a majority of the Senate desired a tribunal of greater dignity than that proposed by Senator Brodhead. While agreeing that the decisions of the tribunal should not be final, Senator Hunter thought that it should be a "court" (rather than a "board"), staffed by "judges," who would "hold their office as judges do under the Constitution of the United States," that its sessions and opinions should

[19] Senator Brodhead expressed doubt whether Congress had the power under the Constitution to waive sovereign immunity and to authorize suit against the government either in "law or equity", and stated that the bill represented a compromise between enlarging the powers of executive officers and expanding those of the judiciary. *Id.*, p. 70.

be public, that records be kept, counsel permitted, the government represented by a regular attorney, and the rules of evidence followed. *Id.*, p. 71. Senator Clayton agreed that the tribunal should be a court, saying (*id.*, p. 72):

> These commissioners ought to be independent. If they are not judges nominally, they are so in fact, and ought to have that best of all qualities pertaining to a judge—perfect independence. I think it was in the convention of Virginia that John Marshall said, that of all the evils that could be inflicted upon a sinning people by an angry Heaven, a dependent judiciary was the worst. This is a court; call it what you please. I wish it to be substantially a court. I do not care for the name, whether you term them commissioners or judges; but I wish them to be independent. Now, my friend has provided in the bill that these commissioners shall be appointed by the President, by and with the advice and consent of the Senate, and "shall hold their office until the time appointed for the expiration of this act, unless sooner removed by the President." I trust the words, "unless sooner removed by the President," will be stricken from the bill. I do not wish these commissioners to sit in this high tribunal, liable, at any moment, to be dismissed by the President or anybody else. I do not wish the President himself, whoever he may be, to be liable, as he will be, constantly, to the imputation of controlling and governing the decisions of this tribunal. For the sake of the President, for the sake of the character of the tribunal, for the sake of

624543—62——4

> perfect justice, I ask that the tribunal may be in fact perfectly independent.

Senator Pettit urged that claims be referred to "the judicial tribunals of the country" for trial in the same manner as suits between private individuals, accurately prophesying that the establishment of a tribunal without power to enter final judgment would not relieve the pressure on Congress. *Id.*, pp. 72–73. Senator Jones thought that "there is but one safe mode of doing it, and that is to establish a court of claims—an independent judiciary, upon the same principle as the Supreme Court." *Id.*, p. 74.

The matter was referred to a select committee (*id.*, p. 74), which reported a bill differing in several important respects from the original one. *Id.*, pp. 105–106. In place of a board of three commissioners to hold office at the pleasure of the President, the new bill provided for a "Court of Claims" of three judges holding office during good behavior. Its sessions were to be public and records kept. It was given the same subpoena power as the federal district courts (a power not given the board proposed by the earlier bill). However, the decisions of the court, like those of the board, were to be advisory only, and were to be reported to Congress together with the facts found and the testimony taken. Where the decision was favorable to the claimant, a bill designed to effectuate the decision was to accompany the report. *Ibid.*

Senator Weller proposed an amendment striking the word "court" wherever it appeared in the bill and substituting the words "board of commissioners." *Id.*,

p. 107. He gave the following reasons for the proposed amendment (*ibid.*):

> Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior. The only power which is given to us on that subject is by the first section of the third article of the Constitution of the United States, which provides that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." In order to avoid the difficulty which is presented to my mind, I am compelled to move to change the character of this tribunal from a court to that of a board of commissioners; and I apprehend that then, under the provisions of the Constitution, it would be perfectly competent for the law-making power of this Government to limit the period for which the commissioners should hold their offices. It may well be doubted whether this bill creates a "court" within the meaning of the provision of the Constitution to which I have referred; but, to avoid all controversies which might arise on this subject, I deem it proper to move the amendment.

The proposal provoked considerable discussion and elicited a variety of opinions as to the character of the tribunal being created. Senator Hunter, a member of the select committee, opposed the amendment, stating that it was of the greatest importance that the members of the body enjoy tenure during good behavior and be as independent of the appointing power "as the Constitution has made the judges of the United States," in order that the actions of the

tribunal should be "sound, and just, and pure, and impartial." *Id.*, pp. 108–109.

Senator Pratt expressed the view that, regardless of what the tribunal was called, it would be exercising judicial power and that, consequently, the Constitution required its judges to have tenure during good behavior. *Id.*, p. 110. Senator Weller disagreed on the ground that the court was to be merely "a court of inquiry—a mere tribunal to take testimony for the final action of Congress."[20] *Ibid.*

Senator Clayton, another member of the select committee, agreed with Senator Pratt, pointing out that the judicial power of the United States, as defined by the Constitution, extends to "controversies to which the United States shall be a party," and maintaining that "every one of these private claims on the Government is a controversy to which the United States necessarily is a party." *Id.*, p. 111. Quoting the clause of Article III, Section 1, requiring that the judges both of this Court and of the inferior courts established under that article hold office during good behavior, he said (*ibid.*):

> Sir, the spirit, to say nothing of the letter, of the Constitution undoubtedly requires that those

---

[20] "The Congress of the United States," the Senator further stated, "undoubtedly has power to appoint commissioners; and what is the provision of this bill but the organization of a board of commissioners to ascertain * * * facts connected with claims against this Government. There is not a word in the bill which makes the opinion of these judges the judgment of a court. * * * It is to be a mere tribunal organized for the purpose of ascertaining facts and taking testimony, and submitting that testimony to the legislative branch of the Government, where the case can finally be disposed of." *Id.*, p. 110.

> who undertake to decide upon these claims should be judges. They should be independent. No man can assign a reason why they should not be, to all intents and purposes, as independent as any other judges existing under the Government. It was, therefore, sir, with a view to the provisions of the Constitution itself, that the committee felt themselves bound to make the report of a bill establishing a court—the judges of which should be as independent as any judge of the Supreme Court of the United States—to decide these cases.

Senator Chase, whose views are of particular interest because he was a member of the Court which later was to decide *Gordon* v. *United States,* 2 Wall. 561,[21] said (*id.,* p. 112):

> I cannot regard this delegation of power to these officers as a delegation, in any sense, of judicial authority—judicial authority, I mean, as prescribed in the Constitution of the United States. Judicial authority implies power to determine finally upon cases submitted to it. No tribunal can be a court in the proper sense of the word, unless it has the power to determine the law in regard to the particular controversies submitted to it. There may be an appeal from it, but if not appealed from, its judgment is final.

Senator Stuart was of the view that the tribunal to be established by the bill was (*id.,* p. 113)—

> a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office.

---

[21] See *infra,* pp. 52–54, including note 26.

He did not think that merely changing the names of the members of the body from "judges" to "commissioners" would affect its status, though he agreed that a bill "might be framed establishing a commission which would not be a judicial tribunal within the meaning of the Constitution." *Ibid.* Addressing himself to the argument that the court proposed by the bill could not be considered a judicial tribunal because it would not have "the power to enforce its judgments," he noted that, under the Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," [22] from which it followed, he said, that (*ibid.*)—

> there is and can be no judicial tribunal which could issue an execution to satisfy a judgment out of the Treasury of the United States, so that test in this instance must fail.

Senator Douglas, who stated that he concurred in Senator Stuart's views, added that it was only because the bill reported by the select committee raised the body as originally proposed "to the dignity of a court of the United States" that it would receive his support. He continued (*ibid.*):

> I think that if we do establish a court of claims, possessed and endowed with all the prerogatives and privileges of a court, to compel the attendance of witnesses, where there can be a fair and impartial investigation, and an attorney to attend to the interests of the United States, so that we can have an adjudication of the merits of each claim, it will bring a weight of authority into the Senate and into the House

[22] Article I, Section 9, clause 7.

> of Representatives which would be binding on our judgments in all cases where the contrary could not be made clearly to appear. If we were to change the name of the tribunal, although I admit, a name is not always of importance, I should attach importance to it in this case. The fact of calling this tribunal a board of commissioners would imply that it was only to take the place of a committee, and to report facts. Now, I want an adjudication which I should deem binding upon us, and on which I could vote to confirm the verdict or judgment of the court without inquiry, and to appropriate the money because they had found it to be due. I want an adjudication in which I could put the same credence that I would give to a decision of the Supreme Court of the United States, so that when their report is made to us, unless some extraordinary cause appeared to the contrary, we should appropriate at once the money, or, if they reported adversely, decide against the claim.

After stating that he desired, for these reasons, that the court be one "with the first men of the country upon the bench, and the first lawyer of the country for the attorney of the United States, before the court," and adverting to the requirement of Article III that judges of courts of the United States hold office during good behavior (*id.*, pp. 113–114), he concluded (*id.*, p. 114):

> Under that view, I shall vote to create a court of claims with the authority of a court, and then give to its members that tenure which the Constitution compels us to give in that event.

With this diversity of opinion before it, the Senate rejected the proposed amendment by a vote of 24 to 16 (thus sustaining the position of those who wished the new tribunal to be a "court"), and passed the bill. *Id.*, p. 114.

It will be noted that at the time of these debates (1854) this Court's decision in *American Insurance Co.* v. *Canter,* 1 Pet. 511 (1828)—in which the distinction between a constitutional court and a legislative court had its origin (see note 26, pp. 51–52, of our brief in the *Lurk* case, No. 481)—was already 26 years old, so that the concept of a "legislative court," exercising judicial power derived from a source in the Constitution other than the Judiciary Article (such as a territorial court, the kind involved in *American Insurance Co.*), could not have been unfamiliar to the Senators who discussed the merits of the bill—men obviously learned in the law. It is significant that their discussion posed the alternatives of a judicial tribunal or a board of commissioners. The possibility that they were creating a "legislative court" occurred to no one. It was uniformly assumed that if the Court of Claims was to be established as a court, it would be one of the inferior courts authorized by Article III.

The House of Representatives passed the bill as approved by the Senate (Cong. Globe (33d Cong., 2d sess.), vol. 30, p. 902), and it became law on February 24, 1855. 10 Stat. 612.

ii. The original Act of 1855

The original act creating the Court of Claims (Act of February 24, 1855, c. 122, 10 Stat. 612) is set forth

in full in Appendix A, *infra,* pp. 117–122. Its chief provisions, so far as relevant, may be summarized as follows:

Section 1 established "a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour." The court was to (*ibid.*)—

> hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress.

A solicitor, appointed by the President, by and with the advice and consent of the Senate, was to represent the government before the court (§ 2). He was to prepare and argue all cases on behalf of the government, cause testimony to be taken when necessary to secure the government's interest, prepare forms, file interrogatories, and superintend the taking of testimony in a manner to be prescribed by the court (*ibid.*).

The court was given authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims; to issue commissions for the taking of such testimony (at either the claimant's or the government's instance); and to issue subpoenas requiring the attendance of witnesses with the same

force as if issued by a district court of the United States (§ 3). False swearing before the court, or before any person or persons authorized by the court to take testimony, was punishable as perjury (§ 6).

At the commencement of each session of Congress, and of each month during the session, the court was to report to Congress the cases in which it had finally acted, stating in each the material facts which it found established by the evidence, with its opinion in the case and the reasons for its decision (§ 7). The testimony in each case was to accompany the report. If one of the judges dissented, his views were to be appended to the majority's report, which, together with the briefs filed by the parties, were to be printed as public documents. The court was to (*ibid.*)—

> prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect.

Two or more cases might be embraced in the same bill if the amount proposed to be allowed in each was less than $1,000 (*ibid.*).

The court's reports in cases in which it had acted favorably to the claimants, and the accompanying bills, if not finally acted upon by Congress during the session in which received, were to be continued from session to session, and from Congress to Congress, until finally disposed of (§ 8). Claims adversely reported upon by the court were to be placed on the congressional calendar; if the decision was thereafter confirmed by Congress, it was to be conclusive, and the court was prohibited from giving further con-

sideration to the claim unless reasons were presented to it which would warrant the granting of a new trial in suits between individuals at law or in chancery (§ 9).

b. THE 1863 AND 1866 AMENDMENTS GIVING FINALITY TO THE COURT'S JUDGMENTS

It soon became apparent, however, that the congressional objective in establishing the court was being defeated by the lack of finality in its decisions. Matters considered by the court were reviewed by Congress in the same detail and with as little expedition as matters in which that tribunal had not acted. Consequently, claimants were loath to invoke the services of the court, and the backlog of unconsidered claims grew in both houses of Congress. President Lincoln, accordingly, in his message to Congress of December 3, 1861, urged that the court be empowered to render final judgments. He said (Cong. Globe, 37th Cong., 2d sess., Appendix, p. 2):

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. *The investigation and adjudication of claims, in their nature belong to the judicial department;* besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended by the organization of

> the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.
>
> Fully aware of the delicacy, not to say the danger, of the subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court, reserving the right of appeal on questions of law to the Supreme Court, with such other provisions as experience may have shown to be necessary. [Emphasis added.]

i. The 1863 Act

So prompted, Congress passed the Act of March 3, 1863, c. 92, 12 Stat. 765, the relevant provisions of which are set forth in Appendix A, *infra,* pp. 122–125. The principal purpose of the Act—an objective which, however, this Court was to hold in *Gordon* v. *United States,* 2 Wall. 561, 117 U.S. 697, was not achieved (*infra,* pp. 52–54)—was to give finality to the court's judgments, subject to a limited right of review by this Court (§§ 3, 5, 7).[23] The Act, in addition, increased

[23] Appeal could be had by either party where the amount in controversy exceeded $3,000; in addition, if a judgment involved a constitutional question, or "affect[ed] a class of cases," or "furnish[ed] a precedent for the future action of any executive department of the Government in the adjustment of such class of cases," the government was granted the right of appeal without regard to the amount in controversy (§ 5).

the size of the court from three to five judges (§ 1)[24] and gave it the power to hear and determine, in addition to claims against the government, setoffs and counterclaims by the government (§ 3). The 14th and final section provided that (Appendix A, *infra,* p. 125)—

> no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

This provision had been proposed as an amendment to the bill during the Senate debates by Senator Hale, who had strongly opposed giving finality to the court's judgments (Cong. Globe, 37th Cong. 3d sess., pp. 270–271, 310, 371, 372, 416), and was accepted by the sponsor of the bill, Senator Trumbull, and the Senate virtually without discussion (*id.,* p. 426). See note 27, *infra,* p. 55.

In the course of the debates, there were several references to making sure that the court was a "court of the United States", an "inferior tribunal", a true "court", a "court sitting during life", etc. See Cong. Globe, 37th Cong., 2d sess., pp. 1672, 1673, 1674, 1675, 1676; Cong. Globe, 37th Cong., 3d sess., pp. 303, 399, 419. A suggestion in the House that the judges be removable at the pleasure of the President was not pressed after it was pointed out that under

[24] One of the five was to be designated the "chief justice" by the President (§ 1).

the Constitution judges hold tenure during good behavior.[25]

Because of Section 14 of the 1863 Act, *supra,* this Court, in *Gordon* v. *United States,* 2 Wall. 561, dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction. According to the opinion prepared for the Court by Chief Justice Taney[26] (117 U.S. 697, 698–699; see also *United*

---

[25] Congressman Hickman proposed that the judges be removable (Cong. Globe, 37th Cong., 2d sess., p. 1675), and then had the following colloquy with Congressman Shellabarger (*id.*, p. 1675):

> MR. SHELLABARGER: I wish to make an inquiry of the learned chairman of the Judiciary Committee. I understand him to take the ground—and I suppose it is the true one—that this is intended to be a court within the meaning of the Constitution. If that be so, then I wish to make an inquiry in relation to a point to which he has just alluded, and which is an important one, and which he proposes to bring before the House in the shape of an amendment. My inquiry is whether it is competent to provide that the judges of any court shall be removable at the pleasure of the Executive—whether their tenure is not during good behavior?
>
> MR. HICKMAN: Well, sir, the objection which has been raised by the gentleman from Ohio proves conclusively that the present is no court. The suggestion which he has made proves that conclusively; and if the amendment which I have suggested is objectionable—and it may be so; it occurred to me on the spur of the moment—of course I do not insist upon it. It strikes me that it may be objectionable.

[26] Chief Justice Taney placed his draft opinion in the hands of the clerk, during the vacation of the Court in 1864, to be delivered to the members of the Court on their reassembling in December of that year, but the Chief Justice died before the justices met. The clerk complied with his request, however, and (as explained in the note preceding the opinion as re-

States v. *Jones,* 119 U.S. 477, 478), the basis of the decision was that under the 1863 Act, as a consequence of Section 14,—

> Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but upon the future action of the Secretary of the Treasury, and of Congress.

The Court said that there was no objection to a provision such as Section 14 so far as the Court of Claims was concerned, since Congress might (117 U.S. at 699)—

---

ported in 117 U.S. 697) "It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so, now prints it with their assent."

The actual judgment of the Court (from which two justices dissented (see 2 Wall. 561)), was announced by Chief Justice Chase (see *United States* v. *Jones*, 119 U.S. 477, 478).

> undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the Executive Departments. In this respect the authority of the Court of Claims is like to that of an Auditor or Comptroller * * *.

But, said the Court (117 U.S. at 704)—

> it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, *unless it was made by an inferior court, exercising independently the judicial power granted to the United States.* It is only from such judicial decisions that appellate power is given to the Supreme Court. [Emphasis added.]

It would appear that the necessary implication of the language we have italicized is that when Section 14 was repealed and this Court thereafter took appeals without question from judgments of the Court of Claims, it must have been on the assumption that the Court of Claims, in rendering such judgments, was exercising the judicial power of the United States—in other words, that it was an Article III tribunal.

ii. The repeal of Section 14 of the 1863 Act by the Act of 1866

Shortly following the *Gordon* decision, Section 14 of the 1863 Act was repealed in order to remove the obstacle to the exercise of appellate jurisdiction

by this Court which the Court had declared it to be. Act of March 17, 1866, c. 19, § 1, 14 Stat. 9; see Cong. Globe, 39th Cong., 1st sess., p. 770.[27] This Court thereafter took appeals without question from the judgments of the Court of Claims. *De Groot* v. *United States,* 5 Wall. 419 (1866); *United States* v. *Alire,* 6 Wall. 573; *United States* v. *O'Grady,* 22 Wall. 641; *United States* v. *Jones,* 119 U.S. 477. The previous refusal to accept jurisdiction was explained as based upon the power of the Secretary of the Treasury under the prior law to examine and revise the judgments of the Court of Claims, the Court observing that the removal of that power made the judgments final and so reviewable by this Court. *United States* v. *O'Grady,* 22 Wall. 641, 647; *United States* v. *Jones,* 119 U.S. 477, 478–479. Thus, in *United States* v. *O'Grady,* the Court said (22 Wall. at 647):

---

[27] Senator Trumbull, the Chairman of the Judiciary Committee, who had sponsored the bill which became the 1863 Act, and who had accepted Senator Hale's amendment from the floor adding Section 14 (see *supra*, p. 51) in the belief that the amendment would not affect the bill's purpose of giving finality to the Court of Claims' judgments (see Cong. Globe, 37th Cong., 3d sess., p. 426), explained, in requesting the repeal of the section in 1866, that it had "been the custom of the Treasury to make an estimate to pay the judgments of the Court of Claims each year, and out of that estimate the judgments are paid"; that he, accordingly, had not anticipated that Section 14 might be construed as giving the Secretary of the Treasury revisory authority over the court's judgments, but that, since this Court had held that the section did have that effect, it was necessary to repeal the section in order to give the 1863 Act its intended effect. Cong. Globe, 39th Cong., 1st sess., p. 770.

> Subsequently [to *Gordon* v. *United States*, *supra*] Congress repealed the provision conferring that [revisory] authority upon the Secretary of the Treasury, and since that time no doubt has been entertained that it is proper that the Supreme Court should exercise jurisdiction of appeals in such cases.

Thus, insofar as Congress was able to do so, it committed the determination of claims against the United States to the judiciary, and established the Court of Claims as a national tribunal for the hearing and decision of such claims, free from all revisory authority on the part of the executive and legislative branches.[28] It is clear that this Court, with the repeal in 1866 of Section 14, assumed that the Court of Claims commenced to exercise the judicial power of the United States in the full sense of the term as used in Article III, and that it was from that date an Article III tribunal. As we shall show, moreover (*infra,* pp. 61–65), this Court on repeated occasions between 1866 and 1929 so declared.

---

[28] It is true that Congress, beginning in 1883 (some seventeen years after giving finality to the judgments of the Court of Claims), gave the court certain functions of an advisory nature in addition to its regular judicial duties—its so-called congressional and departmental reference jurisdiction. For the nature of this jurisdiction, see *infra*, pp. 102–103. The congressional reference jurisdiction is still retained by the court. 28 U.S.C. 1492–2509 (Appendix A, *infra*, pp. 116–117). The departmental reference functions were repealed in 1953 (Act of July 28, 1953, c. 253, § 8, 67 Stat. 226). At pp. 102–107, *infra*, we argue that the conferring of these special functions of a non-judicial character did not affect the court's Article III status and was consistent with that status.

c. THE TUCKER ACT'S VESTING OF CONCURRENT JURISDICTION OF CLAIMS AGAINST THE UNITED STATES IN THE REGULAR FEDERAL COURTS

A further significant indication of Congress's understanding and intent with respect to the character of the Court of Claims is to be found in the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505.[29] Section 1 substantially reenacted, as follows, the basic jurisdiction of the Court of Claims (Appendix A, *infra,* pp. 126–127):

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable [with certain exceptions, not here material].
>
> Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court * * *.

---

[29] The pertinent provisions of this Act are set forth in Appendix A, *infra*, pp. 126–127.

It is to be noted, in the first place, that this basic redefinition by Congress of the Court of Claims' powers and functions occurred only nine years after this Court, in *United States* v. *Union Pacific Railroad Co.*, 98 U.S. 569, 603 (see *infra*, p. 63), had expressly declared that the Court of Claims had been created under Article III and exercised "a defined portion of the judicial power" encompassed by that article. In the light of the established rule that Congress, in reenacting a statute, is presumed to have adopted the construction given to the same language in the prior statute (see, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16, and cases cited), it would seem probable that Congress, in thus reenacting and redefining the powers of the Court of Claims, supposed that it was vesting those powers in an Article III tribunal.[30]

That conclusion is strengthened, moreover, by the highly significant fact that the same Act vested in the regular federal courts (district and circuit) concurrent jurisdiction with the Court of Claims over claims against the United States as above defined. Section 2 provided that (Appendix A, *infra*, p. 127)—

> the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the

[30] Cf. our argument, *infra*, pp. 100–102, that if the Court of Claims had not previously been constituted an Article III Court, it was so constituted upon the reenactment of the provisions providing for the court in the Judicial Code of 1911.

> circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. * * *[31]

The Article III origin and status of the district and circuit courts have, of course, never been questioned. It is to be noted, furthermore, that while ceilings as to the amount in controversy were imposed on the claims cognizable by the regular federal courts, the jurisdiction of the Court of Claims was to continue in the future (as it had been in the past) wholly unlimited in this respect. It would be anomalous to conclude that the Court of Claims, to which Congress entrusted the determination of claims against the government without limit as to amount, was, or was understood by Congress to be, a tribunal of lesser status, dignity, or judicial independence than the ordinary federal tribunals, whose authority to hear such claims was rigidly circumscribed. The Tucker Act thus affords further and striking evidence of the congressional understanding as to the status and character of the Court of Claims as a constitutional court.

d. CONGRESS'S TREATMENT OF THE COURT OF CLAIMS AS PART OF THE REGULAR FEDERAL JUDICIARY IN THE JUDICIAL CODE OF 1911

When the Judicial Code was enacted in 1911 (Act of March 3, 1911, c. 231, 36 Stat. 1087), the provisions

---

[31] This provision (as later amended) is now contained in 28 U.S.C. 1346(a)(2) and (c) (Appendix A, *infra*, pp. 114–115). The $10,000 limitation placed on the jurisdiction of the former circuit courts now applies to the district courts.

pertaining to the establishment, powers, and jurisdiction of the Court of Claims were transferred to the Code (with amendments not here pertinent) and codified as Chapter Seven (§§ 136–187, 36 Stat. 1135–1143) together with the provisions relating to the district courts (Chapters One through Five), the circuit courts of appeals (Chapter Six), the Court of Customs Appeals[32] (Chapter Eight), the former Commerce Court[33] (Chapter Nine), and this Court (Chapter Ten). 36 Stat. 1087–1135, 1143–1160. Congress evidenced its understanding that the Court of Claims was an Article III court by treating it as an integral part of the federal judicial establishment.

e. THE AUTHORITY OF THE COURT OF CLAIMS TO HEAR APPEALS FROM JUDGMENTS OF THE DISTRICT COURTS UNDER THE FEDERAL TORT CLAIMS ACT

More recently, Congress, in the Federal Tort Claims Act of 1946, gave the Court of Claims appellate jurisdiction (provided the notice of appeal had affixed to it the written consent of each appellee) to review any final judgment of a district court in a tort claim proceeding brought against the government under the Act (Act of August 2, 1946, c. 753, Title IV, § 412(a)(2), 60 Stat. 842, 844 (Appendix A, *infra,* p. 128)).[34] This

[32] For our arguments that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) has always been an Aticle III court, see our *Lurk* brief, No. 481, pp. 51–113.

[33] The Commerce Court, created by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and abolished three years later by the Act of October 22, 1913, c. 32, § 1, 38 Stat. 208, 219, was certainly an Article III court. See our *Lurk* brief, pp. 75–76, note 48.

[34] This authority, still possessed by the Court of Claims, is now contained in 28 U.S.C. 1504 (Appendix A, *infra*, p. 116). It does not appear to have been exercised.

jurisdiction of the Court of Claims was made concurrent with that of the courts of appeals (*id.*, § 412(a)(1) (Appendix A, *infra,* p. 128)). Since the courts of appeals and district courts are unquestionably of Article III status, the effect of these provisions was to give to the Court of Claims the power to review judgments of the ordinary Article III trial courts—concurrent with that possessed by the ordinary Article III appellate courts.

2. FROM 1866 TO 1929 THIS COURT UNIFORMLY ASSUMED, AND REPEATEDLY DECLARED, THE COURT OF CLAIMS TO BE AN ARTICLE III TRIBUNAL

The acceptance by this Court, beginning in 1866 (see cases cited *supra,* p. 55), of appeals from the Court of Claims, viewed in the light of Chief Justice Taney's opinion in the *Gordon* case (*supra,* pp. 52–54), unmistakably manifests the assumption by this Court that the "judicial power of the United States," defined in Article III, extends to the determination of claims against the United States. It also shows that the Court of Claims, which after 1866 was exercising such judicial power, was no longer considered by this Court to be a body comparable to an "Auditor or Comptroller" (as it was described in the *Gordon* case) but an "inferior Court" created under Article III, from whose decisions alone, according to the *Gordon* opinion, appeals would lie to this Court.

This assumption has by no means been at all times tacit. The Court in the years between 1866 and 1929 repeatedly and explicitly declared that the Court of Claims was an Article III tribunal, engaged in exer-

cising the judicial power vested by Congress in the courts created by or under that article.

In *United States* v. *Klein,* 13 Wall. 128 (1871), the Court invalidated an act of Congress which had sought to impose a rule of decision on the Court in hearing appeals from the Court of Claims. The Court predicated its decision on the ground that the statute was an attempted legislative encroachment upon the judicial power vested in it by Article III. In basing its holding on this ground, the Court clearly indicated that it considered its appellate jurisdiction over the Court of Claims to be within the ambit of the Judiciary Article. But the Court was more explicit. Observing that "[o]riginally [the Court of Claims] was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress" (13 Wall. at 144), the Court went on to say (at 144–145):

> In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.
>
> The Court of Claims *is thus constituted one of those inferior courts which Congress author-*

> *izes,* and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court. [Emphasis added.]

There can be no doubt that the "inferior courts" to which the Court referred were those "inferior Courts" which Article III, Section 1, gives to Congress the authority from time to time to ordain and establish.

In *United States* v. *Union Pacific Railroad Co.,* 98 U.S. 569, 603 (1878), the Court was even more explicit:

> Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. * * *
>
> * * * * *
>
> It would have been competent for Congress to organize a judicial system * * * [consisting of] a court or courts * * * with authority to exercise * * * jurisdiction throughout the limits of the Federal government. This has been done in reference to the Court of Claims. * * *

In *United States* v. *Louisiana,* 123 U.S. 32 (1887), the Court held that the Court of Claims had jurisdiction of an action by a State against the United States on a money claim arising under an act of Congress. Observing that the judicial power of the United States as defined in Article III extends to controversies to which the United States is a party, the Court declared (at 35):

> The action before us, being one in which the United States have consented to be sued, falls

> within those designated, to which the judicial power extends * * *.

This clearly recognized not only that "Controversies to which the United States shall be a Party", as used in Article III, embrace suits against the government (where consent to suit has been given), but that the Court of Claims, whose ordinary subject matter jurisdiction consisted of just such suits, was a tribunal which derived its authority from that article.

The same point was articulated even more forcefully in *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384, 386 (1902), where the Court said:

> This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. * * *
>
> * * * * *
>
> While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. *Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition.* [Emphasis added.]

To the same effect, see *Kansas* v. *United States,* 204 U.S. 331, 342 (1907); and cf. *Wallace* v. *Adams,* 204 U.S. 415, 423 (1907).

And as recently as 1925, four years before the *Bakelite* decision (in which the first contrary in-

timation appeared), the Court decided a case whose necessary premise was that the Court of Claims was an Article III tribunal. *Miles* v. *Graham,* 268 U.S. 501. It was there held—under the former rule, that taxing a judge's compensation diminished it within the sense of the Article III prohibition—that the salary of a judge of the Court of Claims was tax-exempt. So far as appears, the assumption that the Court of Claims derived its existence and authority from the Judiciary Article was questioned by no one.[35]

---

[35] There is no indication that the dissent of Mr. Justice Brandeis (without opinion) had any relation to the nature of the Court of Claims. Presumably his dissent in the *Miles* case as in *Evans* v. *Gore*, 253 U.S. 245, 264–267 (which laid down the general rule as to the non-taxable status of judges' compensation), was based on the broader ground that a non-discriminatory tax on a judge's pay does not affect a diminution within the meaning of Article III.

Any doubt that Article III was uniformly assumed by this Court (prior to *Williams* v. *United States*, 289 U.S. 553, 571–578) to be the source of the judicial power exercised in determining claims against the United States was removed by the fairly recent use, prior to *Williams*, made by the Court of the *Gordon* case (*supra*, pp. 52–54) and two other early decisions involving claims against the government (to be discussed *infra*, pp. 87–90), *Hayburn's Case*, 2 Dall. 409, and *United States* v. *Ferreira*, 13 How. 40. These decisions, cited as judicial interpretations of the content of the "judicial power of the United States" vested in the inferior courts by Article III, are among the standard authorities for the principle that such courts may not take jurisdiction unless there is presented a "case" or "controversy" within the meaning of Article III, Section 2. See, *e.g.*, *Tutun* v. *United States*, 270 U.S. 568, 576 (1926); *Willing* v. *Chicago Auditorium*, 277 U.S. 274, 289 (1928). Unless claims against the United States are covered by Article III, these older cases, involving such claims, would have been inapposite.

3. *EX PARTE BAKELITE* (1929) *WILLIAMS* v. *UNITED STATES* (1933)

a. In 1929, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite Corporation,* 279 U.S. 438, held that the Court of Customs and Patent Appeals was a "legislative court" created by Congress under its Article I power to lay and collect duties on imports (Article I, Section 8, clause 1); that it derived none of its authority from Article III; and that therefore it could take jurisdiction of an appeal from findings of the Tariff Commission in a proceeding under the Tariff Act of 1922, even though, because the findings were allegedly advisory to the President, the proceeding might not have involved a "case" or "controversy" under Article III, Section 2. In reaching that conclusion, this Court included in the category of legislative courts not only the territorial courts and those for the District of Columbia—created, it was said, pursuant to the plenary power over these areas vested in Congress by Article IV, Section 3 and Article I, Section 8, clause 17—but also a class of "special tribunals" created by Congress (279 U.S. at 451)—

> to examine and determine various matters arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.

In this category the Court placed the Court of Claims (at 452):

> Conspicuous among such matters are claims against the United States. These may arise

> in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as its deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.
>
> The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

Disapproving the *dictum* in *United States* v. *Union Pacific Railroad Co.*, 98 U.S. 569, 603 (*supra,* p. 63), that the Court of Claims was a constitutional court, and the assumption to that effect (see *supra,* pp. 64–65) underlying the holding in *Miles* v. *Graham*, 268 U.S. 501, the Court stated that the Court of Claims, like the courts of the District of Columbia, is not a constitutional court (279 U.S. at 452–455), and declared that the judicial power exercised by it is "prescribed by Congress independently of section 2 of Article III" (at 449). The Court further observed that "Congress always has treated" the Court of Claims as having the status of a legislative court (at 454)—a

statement which we submit would be difficult to reconcile with the relevant history (see *supra,* pp. 36–60).

To support its characterization of the Court of Claims as a legislative court, the *Bakelite* opinion cited *Gordon* v. *United States,* 2 Wall. 561, 117 U.S. 697, which held (see *supra,* pp. 52–54) that judgments of the Court of Claims could not be appealed to this Court when they were subject to revision by the Secretary of the Treasury, and *In re Sanborn,* 148 U.S. 222, which held that an appeal to this Court did not lie from an advisory opinion rendered by the Court of Claims to the Secretary of the Interior.[36] 279 U.S. at 454–455. But the *Gordon* case, as we have seen, was followed by an amendment eliminating the executive revisory authority over the court's judgments, and subsequently its judgments were reviewed by this Court, presumably as decisions of an inferior court created under Article III. *Supra,* pp. 54–56. Chief Justice Taney's description of the court, written when its decisions were considered to be subject to executive revision, therefore became inapplicable after 1866, when the objectionable clause of the 1863 Act was repealed and the court's judgments were made final.

And although *In re Sanborn* approved, inferentially at least, the exercise by the Court of Claims of a function characterized as "ancillary and advisory only" (148 U.S. at 226)—that of reporting its findings and opinions on claims referred to it by executive

---

[36] Under the court's former "departmental reference" jurisdiction. See note 28, *supra,* p. 56.

departments [37]—it would appear from *O'Donoghue* v. *United States,* 289 U.S. 516, decided after *Bakelite,* that the exercise by the Court of Claims of some non-judicial functions is at best inconclusive as to its constitutional or legislative status. For *O'Donoghue,* holding the superior courts of the District of Columbia to be Article III tribunals, recognized at the same time Congress's authority under another constitutional provision (the District of Columbia clause of Article I) to vest those courts with non-judicial powers (289 U.S. at 550–551).[38] It is more likely, we submit, that the Court's implied approval, in *In re Sanborn,* of the exercise by the Court of Claims of some non-judicial functions is to be explained on the hypothesis that the Court there, as in *Wallace* v. *Adams,* 204 U.S. 415, 423 (cf. *Harrison* v. *Moncravie,* 264 Fed. 776, 781–782 (C.A. 8), appeal dismissed, 255 U.S. 562), interpreted *Gordon* v. *United States* as prohibiting only this Court, the sole court established by the Constitution itself, from exercising any non-judicial functions, than on the supposition that

---

[37] The description of the court's function as "ancillary and advisory only" was restricted in the *Sanborn* opinion to "such a case," *i.e.*, the case of an advisory opinion rendered without final judgment. 148 U.S. at 226. The function of rendering advisory opinions to the heads of executive departments, first given to the court in 1883, was repealed in 1953. See note 28, *supra*, p. 56.

[38] Thus, it is clear from the *O'Donoghue* decision that the power of Congress to confer non-judicial functions upon the District of Columbia superior courts stems from the fact that in establishing those courts Congress exercised dual powers, not from their character as legislative courts. We argue, *infra*, pp. 103–107, that the Court of Claims is similar to the District of Columbia courts in this respect.

the Court in *Sanborn* looked upon the Court of Claims as "legislative," deriving its authority from a source other than Article III. This conclusion is fortified by the consideration that at the time *In re Sanborn* was decided (1893) the conception of a legislative court as one in which non-judicial as well as judicial functions may properly be vested had not yet evolved—certainly not with any degree of clarity.[39] As we have shown (*supra,* pp. 61–65), this Court continued long after *In re Sanborn* to regard the Court of Claims as an Article III court. See, particularly, *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384, 386 (1902).

In connection with its statement that "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it" (279 U.S. at 451)—the primary and fundamental premise of the *Bakelite* opinion's conclusion that the Court of Claims was a legislative court

---

[39] *American Insurance Co.* v. *Canter*, 1 Pet. 511, in which the distinction between constitutional and legislative courts had its origin, had no bearing on this aspect of the nature of a legislative tribunal. Probably the first suggestion of the notion (that non-judicial as well as judicial duties may be exercised by a legislative court) is to be found in the *Gordon* case, 117 U.S. at 699 (see *supra*, pp. 53–54)—though the statements in that case which might be thought relevant were made with respect to a court (the Court of Claims before 1866) which, properly speaking, had no judicial duties at all. The concept does not appear to have reached fruition prior to *Keller* v. *Potomac Electric Co.*, 261 U.S. 428 (1923) and, particularly, Postum *Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 700 (1927)—both of which involved the superior courts of the District of Columbia.

(see *supra,* pp. 18–19, 66–67)—the Court went on to say (*ibid.*):

> The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

For the latter proposition the Court cited a number of its prior decisions (279 U.S. at 451, note 8). But in most of the cases cited, the tribunals involved, or about which the opinions spoke, were the regular federal courts, whose Article III status was and is unquestioned.[40] And wherever the question was raised, the Court assumed that the conditions placed by Article III upon the exercise of judicial power, including the existence of a "case" or "controversy," had to be met.[41] No attempt was made in the *Bakelite* opinion to reconcile its conclusion as to the legislative character of the Court of Claims with these decisions, which assumed the applicability of Article III to matters committed by Congress to judicial determination though not *requiring* such determination. See also our *Lurk brief,* No. 481, at pp. 90–94, where we show that the supposition that a court in which

[40] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 275, 280–285; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *Auffmordt* v. *Hedden*, 137 U.S. 310, 329; *In re Fassett*, 142 U.S. 479, 486–487; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659–660; *Passavant* v. *United States*, 148 U.S. 214, 218–219; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714–715, 727–732.

[41] See *Gordon* v. *United States*, 117 U.S. 697, 702; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 728–729; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 455.

Congress vests jurisdiction it need not have placed in any court is necessarily a legislative tribunal (deriving none of its authority from Article III) runs counter to the established jurisprudence of this Court and the practice of many decades.

The short of the matter is, we submit, that the previous decisions of this Court furnish no support for the conclusion reached in *Ex parte Bakelite,* and subsequently adopted in *Williams* v. *United States,* 289 U.S. 553 (see *infra,* pp. 73–74), that the Court of Claims, because it handles matters susceptible of judicial determination but not requiring it, does not derive its authority from Article III of the Constitution. And no reason, grounded in policy or logic, is advanced for that view. The fact that a court's business consists exclusively of matters which *need* not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. The important consideration is that the matters were in fact so committed, and that the court's decisions are final and not revisable by the executive or legislative branch. Various matters have, historically, been submitted to constitutional courts although they could have been determined non-judicially, as the *Bakelite* opinion inferentially recognized. See 279 U.S. at 451, note 8; and discussion, *supra,* pp. 70–72, and in our *Lurk* brief, No. 481, at pp. 90–94. Moreover, the creation of special Article III courts to exercise particular types of jurisdiction is not foreign to our history,[42]

[42] Cf. the former Commerce Court (as to which see our *Lurk* brief, notes 48 and 61, pp. 75–76, 95), the former Emergency Court

and in *Lockerty* v. *Phillips,* 319 U.S. 182, 187–188, this Court indicated that nothing in the Constitution prevents Congress from limiting the jurisdiction of the inferior tribunals established under Article III.

b. Ex parte Bakelite prepared the way for the decision in *Williams* v. *United States,* 289 U.S. 553 (1933), holding the Court of Claims to be a non-Article III tribunal—whose judges lacked the protection afforded by Article III against salary diminution during continuance in office. The Court acknowledged that the Court of Claims "undoubtedly * * * exercises judicial power" (289 U.S. at 565), but held that it was not "the judicial power defined by Art. III of the Constitution" (*ibid.*). The Court "conceded at the threshold" that it had expressed a contrary opinion, "more or less irrelevantly," in *United States* v. *Klein,* 13 Wall. 128, 145; *United States* v. *Union Pacific Railroad Co.,* 98 U.S. 569, 603; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386; *Kansas* v. *United States,* 204 U.S. 331, 342; and *United States* v. *Louisiana,* 123 U.S. 32, 35 [43] (289 U.S. at 568). It adhered to and adopted its more recent *dictum* in the *Bakelite* case that the court was a legislative court (289 U.S. at 568–569). In doing so, it approved and reaffirmed the rationale of the *Bakelite* opinion that a court created by Congress to hear and determine matters not requiring (though susceptible of) judicial determination is a legislative tribunal and de-

---

of Appeals (as to which see *id.*, note 61, p. 95), and—as we maintain in the *Lurk* case—the Court of Customs and Patent Appeals.

[43] See *supra*, pp. 61–64.

rives none of its powers from the Judiciary Article. *Id.* at 569, 571.

A second basis of the *Williams* decision—one not considered in *Ex parte Bakelite*—had to do with the scope of the clause "Controversies to which the United States shall be a Party," to which "the judicial power of the United States," as defined in Article III, Section 2, extends (289 U.S. at 571–578).[44] The *Williams* opinion, while conceding that claims against the United States (which constitute the ordinary subject matter of the Court of Claims' jurisdiction) come literally within the purview of this phrase (289 U.S. at 573), held that such claims, nevertheless, fall without this category of controversies, properly construed—for the reason, the Court said, that "Controversies to which the United States shall be a Party" must be deemed to embrace only controversies to which the United States is a party *plaintiff*. The principal reason for this limited construction of the constitutional phrase, in the Court's view, was that to construe it as including controversies to which the United States is a party defendant would be inconsistent with the principle of sovereign immunity—

[44] The entire discussion in the *Williams* opinion of the scope and meaning of the clause "Controversies to which the United States shall be a Party" might from one point of view be considered as *dictum* (cf. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 640–641, note 20 (opinion of Vinson, C.J.)). The fact, however, that the Court devoted over a third of the opinion to consideration of the point reflects at least that, if *dictum*, it was not casual. As we read the opinion, the Court's view as to the scope of the "United States" clause amounted to a secondary basis of the decision. Certainly it strongly influenced the result.

that the government cannot be sued without its consent.

We show immediately below (pp. 75–91) that this rationale, in addition to being opposed to the Court's own prior pronouncements—see, in particular, *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384, 386 (quoted *supra,* p. 64)—is unsound in principle and contrary to the clear intent of the framers of the Constitution.

4. "CONTROVERSIES TO WHICH THE UNITED STATES SHALL BE A PARTY"

The flaw in the Court's reasoning, we believe, is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the premise that the phrase "Controversies to which the United States shall be a Party" was not intended as a blanket consent by the sovereign to be sued, the Court concluded that this prevented application of the provision even where consent had been given by Congress. But, like the other categories of controversies enumerated in Section 2 of Article III, this particular ground of jurisdiction does not dispense with other necessary conditions to the valid exercise of judicial power. The judicial power, for example, extends to suits between citizens of different states, but this does not automatically confer jurisdiction. The defendant must be brought into court by service of process, by consent to suit through filing an appearance, or by other accepted judicial processes. If a defendant is without the jurisdiction, he may often be sued only if he consents to jurisdiction. Similarly, when jurisdiction is invoked of a suit against the United States, the require-

ment as to obtaining personal jurisdiction over the defendant must still be observed, which means that the sovereign must consent to be sued. Once the question of personal jurisdiction is separated from that of the general jurisdiction of the court over the subject matter, it becomes plain that Mr. Justice Sutherland's correct premise that Article III, Section 2, was not a consent by the United States to be sued does not lead to his conclusion that Article III, Section 2, excludes from the constitutional jurisdiction of the inferior courts controversies to which the United States is a party defendant—if consent to suit is otherwise given.[45]

For his conclusion that the framers were using "party" only in the sense of "plaintiff," Mr. Justice Sutherland relied in *Williams* principally upon three historical circumstances: (1) that the doctrine of sovereign immunity from suit was well known at the time of the framing of the Constitution; (2) that, subsequent to the Convention, Marshall, Madison, and Hamilton expressed the view that Article III did not affect the immunity of individual states from suit; and (3) that, with respect to suits involving the United States, the Judiciary Act of 1789 conferred

---

[45] The *Williams* case characterized as "peculiarly suggestive" "the omission to qualify 'controversies' by the word 'all', as in some other instances." 289 U.S. at 573. We have been able to discover no intimation whatsoever in the historical material to support this view, and submit that it will not bear analysis. The categories of controversies "between two or more States" and "between Citizens of different States" are similarly unqualified, but their comprehensiveness can hardly be questioned.

jurisdiction upon the circuit courts only "where * * * the United States are plaintiffs, or petitioners" (§ 11, 1 Stat. 78). 289 U.S. at 573 *ff*. We submit that none of these reasons supports the conclusion reached.

a. SOVEREIGN IMMUNITY AND THE POWER OF WAIVER

While the doctrine of sovereign immunity was indeed a "well settled and understood" rule (289 U.S. at 573) at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

i. In England, the waiver of immunity became known as early as the thirteenth century when the Petition of Right first evolved. This remedy was used for almost 400 years, and consisted of a petition to the Crown setting up the claim of legal right, which, after being endorsed "let right be done," was followed by a Commission issued out of Chancery to find the facts, an answer by the Crown to the petitioner's plea, and a trial on the issue in the King's Bench or the common-law side of the Chancery. As the centuries passed, this remedy against the Crown gave way to more expeditious procedures, and extended powers of relief against the Crown by judicial proceedings became available to the subject in several courts created during the reign of Henry VIII (the Courts of Augmentations, Wards, and Surveyors), subsequently merged into the Court of Exchequer. And while there appear to be no reported cases based

upon the petition of right between 1615 and 1800, several new remedies emerged. The English experience is summarized in greater detail in Appendix B, *infra*, pp. 130–137.

In 1668, it was first clearly recognized that a subject was entitled to equitable relief against the Crown in the Court of Exchequer (*Pawlett* v. *Attorney General*, Hardres 465). Rejecting the Crown's contention that the plaintiff's relief was solely by a petition of right, Chief Baron Hale granted relief to a mortgagor upon a bill against the Attorney General to redeem mortgaged lands seized by the King after the mortgagee's heir had been attainted of treason. And in the next century the jurisdiction of the Court of Exchequer to give equitable relief against the Crown was still recognized. *Reeve* v. *Attorney General*, 2 Atkyns 223 (1741); *Burgess* v. *Wheate*, 1 Eden 177, 225–256 (1757–1759); Bl. Comm., iii, 428–429. (See Appendix B, pp. 135–137, *infra*.) [46] Thus, waiver of sovereign immunity and consequent jurisdiction in the courts to entertain judicial proceedings and grant judgments against the Crown was known in England for many centuries before the adoption of the federal Constitution. In the eighteenth century, the already well-established rule that redress against the Crown could be secured through judicial proceedings must have been known to lawyers in the American colonies.

---

[46] Where the relief sought from the Crown was payment of a sum due, a petition to the Barons of the Exchequer was held to lie, although petition of right was also available. *Bankers' Case*, 14 S.T. 1 (House of Lords, 1690–1700).

ii. The waiver of immunity was also known in this country both during and after the Revolution, and the courts of several of the original states were often entrusted with the adjudication of claims against the state. Broad statutory waivers of immunity were adopted in Maryland and Virginia, while a more restricted practice prevailed in Delaware, Connecticut, North Carolina, Georgia, and New Jersey. See Appendix B, *infra,* pp. 137–143. Thus, in Virginia, an Act of 1778 authorized suit in "the high court of chancery or the general court" upon any alleged right in law or equity "against the commonwealth," and the Supreme Court of the State observed that "there never has been a moment since October 1778 that all persons have not enjoyed this right by express statute" to sue the Commonwealth of Virginia. See *Higginbotham's Executrix* v. *Commonwealth,* 66 Va. 627, 637 (1874). Shortly after the Constitution was adopted, the Court of Appeals of Virginia upheld a judgment against the state for the value of an impressed vessel, upon a statutory reference of the claim to the judiciary after it had been administratively denied (*Commonwealth* v. *Cunningham & Co.,* 8 Va. 331 (1793)).[47]

Other states likewise had waivers of immunity. The early Delaware Constitution (1792) authorized suits "against the State, according to such regulations as shall be made by law" (*The Federal and State*

[47] The opinion was written by Judge Pendleton who, as President of the Virginia Convention elected to consider the Constitution, had been instrumental in its ratification. The claimant was represented by "Marshall," presumably John Marshall. Cf. 2 Beveridge, *Life of Marshall,* p. 177.

Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America, H. Doc. 357, 59th Cong., 2d sess., vol. 1, pp. 568, 569). A Maryland statute passed January 20, 1787, antedating the Constitution, authorized actions at law against the state for money claims, with a jury trial. 2 Kilty, *Laws of Maryland,* c. LIII. In Georgia, persons claiming estates confiscated during the Revolution were permitted to appeal to the superior courts from determinations of a Board of Confiscation Commissioners (1 *Revolutionary Records of the State of Georgia,* pp. 334, 341–342; 3 *id.* 409). Compare a similar procedure in North Carolina (24 *State Records of North Carolina,* p. 212) and a somewhat different procedure in New Jersey, also permitting judicial determination of the right to an estate subject to confiscation (*Acts of the Council and General Assembly of the State of New Jersey* (1776–1783), compiled by Peter Wilson, Trenton (1784), printed by Isaac Collins, pp. 43–46).[48]

b. THE INTENT OF THE FRAMERS OF THE CONSTITUTION

The waiver of sovereign immunity was thus a common practice in Anglo-American law at the time of the adoption of the Constitution. If, as the *Williams*

[48] See also indications of suits against the state in a 1789 statute of Connecticut (*Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America; etc.*, Jan. 1789 (New London, printed by T. Green and Son), pp. 375–376); and in an early Delaware statute (*Laws of the State of Delaware* (1700–1797), printed by Smauel and John Adams, New Castle (1797), vol. 2, pp. 658–659). All these are more fully discussed in Appendix B, pp. 137–143, *infra.*

case suggests, the doctrine of sovereign immunity was known to the framers, the practice of waiving that immunity must have been equally familiar. That such was the case is in fact revealed in Hamilton's remarks in *The Federalist,* where he expressly distinguishes between suits with and suits without the consent of the sovereign. See Appendix C, pp. 144–148, *infra.* Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "Controversies to which the United States shall be a Party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff.

Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. On August 20, 1787, Charles Pinckney moved to add to the Report of the Committee of Detail the statement that "The Jurisdiction of the supreme Court shall be extended to all controversies between the U.S. and an individual State, or the U.S. and the Citizens of an individual State." [49] Two days later, the Committee of Detail

---

[49] *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. 398, 69th Cong., 1st sess., p. 572. A year prior thereto Pinckney had drafted and presented to Congress a report on August 7, 1786, calling for an amendment of the Articles of Confederation to provide for a Federal Judicial Court whose jurisdiction was to include appellate jurisdiction from state courts "in all causes * * * wherein questions of importance may arise, and the United States shall be a party." Warren, *The Making of the Constitution*, p. 329. Subsequently he submitted the same plan to the Constitutional Convention, calling for a Supreme Federal Court with appel-

recommended that the judicial power be extended to controversies "between the United States and an individual state or the United States and an individual person." [50] No action was ever taken on this recommendation, but on August 27, 1787, the Constitutional Convention adopted the phrase now appearing in Article III, Section 2—"Controversies to which the United States shall be a Party"—upon a motion by James Madison and Gouverneur Morris.[51] This "was evidently adopted as a substitute for the Committee's recommendation and was probably intended to cover the same ground." [52]

There is no evidence at the Constitutional Convention of any intention that the phrase in question, more sweeping in scope than any of the preceding proposals, was used in other than its plain meaning. The delegates, most of whom were trained at the bar,[53] must have known the difference between party plaintiff and party defendant, and must have been aware that the term "party" embraces both. Cf. *Chisholm* v. *Georgia,* 2 Dall. 419, 451 (opinion of Blair, J.). Since one can hardly attribute to the framers the prophetic ability to anticipate the derivation of judicial powers from an article professing to grant legislative powers, an intention to exclude from the federal judicial power the determination of claims against the government would be tantamount to an

late jurisdiction from the state courts, including jurisdiction "in all Causes * * * wherein [the] U.S. shall be a Party." H. Doc. 398, *op. cit.*, p. 965.

[50] H. Doc. 398, *op. cit.*, pp. 595–596.

[51] *Id.*, p. 624.

[52] Warren, *The Making of the Constitution*, pp. 536–537.

[53] Warren, *op. cit. supra*, p. 55.

intention to deny a mode of settling claims which had been available in the mother country for centuries. Such an intention is not easily to be conjured. The *Williams* opinion did not suggest any possible reason why the makers of the Constitution, if they had given thought to the United States as a party defendant, would not have placed such a suit within the judicial power which they were defining. The Court apparently was of the view that the framers assumed that the government could not be sued under any circumstances, and that therefore they did not intend Article III to give the courts jurisdiction over suits against the United States. It is more likely that, if the issue had been specifically presented, the framers would have disavowed any intention to exclude from the judicial power a class of cases, suits against the sovereign with its consent, which had been heard and decided by the English courts for centuries.[54]

The decision in the *Williams* case gains no support from the views of Marshall, Madison, and Hamilton on the suability of an individual state. Their remarks (set forth in Appendix C, pp. 144–146, *infra*) were addressed solely to the question whether there was a surrender of this immunity "in the plan of the convention." In denying that the Constitution affected the suability of the individual states, Marshall, Madison, and Hamilton were seeking to remove the fears of those, such as Patrick Henry, who believed that the federal Constitution automatically subjected the states to suit (See Appendix C, pp. 146–147, *infra*).

---

[54] Cf. Marshall, C. J., in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407: "[I]t is *a constitution* we are expounding."

The Supreme Court rejected their interpretation in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), pointing out that the automatic waiver of state immunity, found in Section 2, did not necessarily mean an automatic waiver of federal immunity. But there is no hint that suits with the consent of the government would not be embraced within the section, for obviously none of the objections based upon sovereignty would apply where the state voluntarily submitted itself to court proceedings; and the statements of Marshall, Madison, and Hamilton had no relevance to such a situation.[55] In fact, in the Virginia debates

[55] Despite the position taken by Marshall, Madison, and Hamilton, the Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, held that Article III subjected a state to suit without its consent by an individual citizen of another state. The opinion of Chief Justice Jay (at p. 478) included the following comments with respect to suits against the United States:

"Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not

on the Constitution, both Madison and Marshall expressly acknowledged that, if a state consents to be sued by a foreign nation, Article III would authorize jurisdiction in the federal courts over such a suit, by virtue of the clause in Section 2 extending the federal judicial power to controversies "between a State * * * and foreign States * * *". See *Principality of Monaco* v. *Mississippi,* 292 U.S. 313, 323–324.

Hayburn's Case, 2 Dall. 409, decided within five years after the Constitution was adopted, likewise contains the implication that claims against the United States would be embraced within Article III, Section 2, if the requisite judicial procedures were provided. See *infra,* pp. 87–89.

c. THE JUDICIARY ACT OF 1789

Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 (1 Stat. 73) is authority for, rather than against, the view that Article III of the Constitution extends the judicial power to suits against the United States. Section 11 of the Act gave

---

to be thus collaterally and incidentally decided: I leave it a question."

These remarks are plainly confined to the question whether Article III, without more, removes the immunity of the United States from suit. Chief Justice Jay could not have had in mind suits to which the United States had consented, for there would then be no need for "power which the courts can call to their aid."

The only other contemporary references to the question whether the United States could be sued are a statement by George Nicholas, at the Virginia Convention, and a letter from Luther Martin (Attorney General of Maryland and delegate to the Constitutional Convention) addressed to the Maryland legislature. See Appendix C, pp. 147–148, *infra.*

to "the circuit courts * * * original cognizance * * * of all suits of a civil nature * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners." The *Williams* opinion thought that the words "where * * * the United States are plaintiffs, or petitioners" delineated the scope of the phrase "Controversies to which the United States shall be a Party" in Article III. This assumes that Congress intended, by the Judiciary Act, to vest in the circuit courts all the judicial power conferred in Article III. But the Act and its legislative history contradict any such intention. Thus, Section 11 of the Act expressly withheld from the circuit courts the exercise of the judicial power over suits "where the matter in dispute" did not exceed five hundred dollars, even though nothing in Article III would preclude the bestowal of jurisdiction over such matters. Moreover, the House debates on the Act show that Congress recognized a clear distinction between the extent of the judicial power conferred by Article III and the degree to which it was to be vested in the inferior courts by the Act.[56] Under these circumstances, the more likely inference is that Congress used the words "plaintiffs or petitioners," rather than the exact language of Article III, to show that the Act was not intended to exhaust the judicial

---

[56] Annals of Congress. vol. I, pp. 782–785, 796–833, *passim*. The discussion, if any, in the Senate is not available, since the debates of that body were not printed until 1794, and there appear to have been no printed reports or hearings on the Act.

power conferred in Article III, nor to operate as a consent to suit.[57]

d. THE EARLY AUTHORITIES

Less than five years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the federal circuit courts, considered the validity of an Act of Congress authorizing those courts to examine certain pension claims against the government by veterans with war-caused disabilities, to determine a just allowance for pension arrearages, to ascertain the degree of disability and "to transmit the result of their inquiry * * * to the Secretary at War, together with their opinion in writing" as to the proportion of the monthly pay which would be equivalent to the ascertained degree of disability (Act of March 23, 1792, c. 11, § 2, 1 Stat. 244). The Act directed the Secretary at War, upon receipt of the proofs considered by the court and its opinion, to place the applicant's name on the pension list, unless the Secretary had "cause to suspect imposition or mistake," in which event he was authorized to withhold the name from the list and report the matter to Congress (§ 4).

---

[57] The *Williams* case, 289 U.S. at 574, cited with approval the following *dictum* of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 411–412: "* * * The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that *the judiciary act does not authorize such suits.*" [Emphasis added.] This statement suggests that the Judiciary Act, which was confined to creating inferior courts and bestowing judicial powers upon them, could have "authorized" suits against the United States.

Acting on behalf of William Hayburn, a pension applicant, the Attorney General sought a writ of mandamus from this Court to require the Circuit Court for the District of Pennsylvania to act under this statute. Before the Court could decide the motion, the relevant portions of the statute were repealed (1 Stat. 324). However, the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, containing five of the six members of this Court (Chief Justice Jay and Justices Cushing, Wilson, Blair, and Iredell) had previously expressed the opinion that the statute was invalid. *Hayburn's Case,* 2 Dall. 409. All agreed that the Act sought to vest non-judicial power in the courts since their decisions were made subject to revision by the executive and Congress. The significance of their opinions for present purposes, however, is the fact that all three assumed that Article III of the Constitution is applicable to the determination of claims against the government entrusted to the judiciary, and that before jurisdiction of controversies arising from such claims can be had by the courts, both the procedure and the tribunal must meet the requirements of that Article. Thus, the Circuit Court for North Carolina declared that the Secretary at War, who was vested by the Act with a power of review over the circuit courts, was incapable of acting as an appellate tribunal in respect to such claims, because such a tribunal (2 Dall. at 413)—

> must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their

> good behavior, by which tenure the office of secretary at war is not held.

The opinions of the other two circuit courts make the same assumption. 2 Dall. at 410, 411. Since the justices and judges joining in these opinions included men who had been prominent in the drafting of the Constitution, their interpretation of that document less than five years after it became effective is an important contemporary guide to its meaning.

United States v. *Ferreira,* 13 How. 40 (1851), is a similar case, involving a special act of Congress authorizing the judge of the United States District Court for the Northern District of Florida to receive and adjudicate claims of certain named persons for damages due to the operations of the American Army in Florida. The judge's decision, with the evidence on which it was founded, was to be reported to the Secretary of the Treasury, who was directed to pay the same "on being satisfied that the same is just and equitable." 3 Stat. 768; 6 Stat. 569; 9 Stat. 788. This Court held that it had no jurisdiction of an appeal from a decision by the district judge on such claims. The ground for the decision, as set forth in an opinion by Chief Justice Taney, was that since the judge's decision was not final until approved by the Secretary of the Treasury, the power to decide the claims was not conferred "as a judicial function" in "the sense in which judicial power is granted by the Constitution to the courts of the United States." 13 How. at 46–48.[58]

[58] The Chief Justice observed that the special act merely conferred authority upon the judge as "a commissioner to adjust

The rationale in both these cases is the same: what prevented the jurisdiction exercised by the inferior courts from being Article III judicial power was *not* the fact that the subject matter consisted of a claim against the United States, but the revisory power in the legislative or executive. As we have pointed out (*supra,* pp. 52–56), that was later made explicit in three cases dealing with the power of this Court to review decisions of the Court of Claims: *Gordon* v. *United States,* 2 Wall. 561, 117 U.S. 697, which held that the revisory power over decisions of the Court of Claims at one time vested in the Secretary of the Treasury and Congress precluded review of that court's judgments by this Court; and *United States* v. *O'Grady,* 22 Wall. 641, and *United States* v. *Jones,* 119 U.S. 477, which upheld the exercise of such appellate review after the revisory power was eliminated.

This conclusion is reenforced by *Chisholm* v. *Georgia,* 2 Dall. 419, holding, within five years of the ratification of the Constitution and with the participation of prominent members of the Constitutional Convention, that "Controversies * * * between a State and Citizens of another State" (another of the categories of controversies to which Article III extended the federal judicial power) and "Cases * * * in which a State shall be Party" (as to which this Court was given original jurisdiction) included suits brought *against* a State by citizens of a different State. This ruling seems to us vir-

---

certain claims against the United States." 13 How. at 47. The Court declined to decide whether the judge could validly act in this capacity since the issue was not before the Court (at 51–52).

tually conclusive that the term "party" as used in Article III was not intended to be limited to plaintiffs. It seems most unlikely that the term as used in the phrase extending the judicial power to controversies "to which the United States shall be a Party" was intended to refer only to the United States as a plaintiff, if the term as used in the phrase conferring original jurisdiction upon this Court over cases "in which a State shall be Party" applied whether the State was a plaintiff or a defendant. If the framers had intended the term "party" in the former context to be limited in the manner that the *Williams* decision suggests, it seems almost certain that they would have made the limitation explicit.

In view of the foregoing considerations, we believe that the grant of jurisdiction in Article III, Section 2, is not limited to cases in which the United States is a party plaintiff. The historical background upon which this conclusion is predicated was not, in all its aspects, before the Court in the *Williams* case. We submit that the words of Article III, read literally and in their historic setting, demonstrate that *Minnesota* v. *Hitchcock* and the earlier authorities, rather than *Williams* v. *United States,* state the correct doctrine, and that the judicial power exercised by the Court of Claims is part of that defined in Article III.

5. "CASES, IN LAW AND EQUITY, ARISING UNDER THIS CONSTITUTION, THE LAWS OF THE UNITED STATES * * *"

A question not considered in the *Williams* opinion is whether the cases heard by the Court of Claims

do not fall within the "federal question" jurisdiction defined in Article III—"Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *." If they do, it would appear to be irrelevant whether, in addition, they are embraced within the category "Controversies to which the United States shall be a Party." If either category applies, the court exercises the judicial power of the United States. We think the issues it decides come under both categories.

The principal jurisdictional statute pertaining to the Court of Claims (28 U.S.C. 1491 (Appendix A, *infra*, pp. 115–116)) vests in the court the power—

> to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[59]

Even with respect to claims based on contract, the authority so conferred is embraced within the federal question category, since all federal contracts must stem from some congressional authority. Cf. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 649 (opinion of Frankfurter, J.); *Eastern Extension Telegraph Co.* v. *United States*,

[59] The section derives, with minor variations in language, and apart from details having no present relevance, from Section 1 of the Tucker Act of 1887 (see *supra*, p. 57). The same section of the Tucker Act gave the court power to render judgment *against* the claimant on set-offs and counterclaims by the government. The latter power is now provided for in 28 U.S.C. 1503 (Appendix A, *infra*, p. 116).

251 U.S. 355, 365–366. To the extent that its power extends to the adjudication of claims founded on the Constitution, any Act of Congress, or any regulation of an executive department, we do not see how there can be any doubt that this is so. *Hayburn's Case,* 2 Dall. 409; *Osborn* v. *United States Bank,* 9 Wheat. 738, 819; *United States* v. *Ferreira,* 13 How. 40, 46–50; *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 284; *Gordon* v. *United States,* 117 U.S. 697; *Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, 487; *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 455–458; *Muskrat* v. *United States,* 219 U.S. 346; *Tutun* v. *United States,* 270 U.S. 568, 576–577. And see the opinions of Mr. Justice Rutledge, Chief Justice Vinson, and Mr. Justice Frankfurter in *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 610, 640–642 (notes 20–21), 649.

The fact that this Court in literally hundreds of cases has granted review of Court of Claims judgments—since its decisions were given finality in 1866, and in particular has granted review since *Williams* was decided—is further indication that the Court has considered that these cases present federal questions within the scope of Article III. If *Williams* was correct in holding that Article III does not endow any Article III court with power to decide cases in which the United States is the defendant, then the only basis for this Court's power to review decisions of the Court of Claims (as well as of District Court Tucker Act rulings) is the federal questions clause of Article III. There would be no other head of

jurisdiction under the Constitution. In addition, the same authority exercised by the Court of Claims is also exercised by the district courts—subject to a $10,000 limitation as to the amount of any claim. 28 U.S.C. 1346(a)(2) (Appendix A, *infra,* pp. 114–115). If such claims involve federal question jurisdiction when heard by the district courts,[60] it would obviously be incongruous to suppose that they do not involve such jurisdiction when heard by the Court of Claims, whose power is subject to no jurisdictional limit.

C. *Doubt as to the nature of the Court of Claims should be resolved in favor of its Article III genesis, in the light of Congress's 1953 declaration*

Our analysis of the *Williams* decision and rationale in the light of the relevant historical materials has thus far taken no account of the 1953 declaration by Congress that the Court of Claims was in fact established under Article III of the Constitution. See *supra,* pp. 26–36. Implicit in that declaration, as the legislative history of the enactment makes clear, was the view of Congress that this Court, in holding in *Williams* that the Court of Claims was a legislative court, reached an erroneous conclusion as to the constitutional powers of Congress that body exercised and intended to exercise in establishing the court.

Whatever doubt might remain as to the soundness or unsoundness of the *Williams* decision, apart from the 1953 declaration, ought now to be resolved in

---

[60] Cf. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610, 640–642 (notes 20–21), 649–650 (opinions of Mr. Justice Rutledge, Chief Justice Vinson, and Mr. Justice Frankfurter).

favor of the correctness of the congressional conclusion—*i.e.*, that *Williams* mistakenly construed the effect and intent of Congress's action in establishing the court. It needs no elaborate argument that this Court should accord great weight to a formal and authoritative declaration by Congress, as the creator of a judicial tribunal, proclaiming which of its powers it exercised in bringing the court into being. Particularly should this be so where the relevant history indicates that Congress actually intended to create the Court of Claims in the exercise of its Article III authority—just as, in 1953, it said it did.

D. *There is no constitutional obstacle to the conclusion that the Court of Claims was validly established by Congress under Article III*

There remain to consider two possible constitutional objections to the conclusion that the Court of Claims was validly established by Congress under the Judiciary Article. Neither, in our view, has merit.

1. THAT THE COURT OF CLAIMS LACKED THE POWER TO RENDER FINAL JUDGMENTS PRIOR TO 1866 IS CONSISTENT WITH THE VIEW THAT IT ACQUIRED ARTICLE III STATUS WHEN, IN THAT YEAR, THAT POWER WAS GIVEN TO IT

a. We have seen that the Court of Claims, from its creation in 1855 until the passage of the Act of March 3, 1863 (as amended by the Act of March 17, 1866, repealing the 14th section of the 1863 Act), possessed all the attributes of an Article III tribunal with the single exception—important as that exception undeniably was—that it lacked the power to render final

judgments. It was staffed by judges with life tenure, appointed by the President by and with the advice and consent of the Senate. It had the power to hear all claims against the United States "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States," as well as all claims referred to it by either house of Congress. It had the authority to establish rules and regulations for its governance and to issue commissions and appoint commissioners for the taking of testimony. It had the power of subpoena—in the same measure and with like effect as that possessed by the district courts. False swearing before it, or any commissioner appointed by it, was punishable as perjury in the same manner as the like offense in any federal court. *Supra,* pp. 46–48.

The one respect in which it differed from the regular federal courts of that time (apart from the special nature of the subject matter of its jurisdiction)[61] was that, unlike the regular courts, which were vested with the power to render final judgment in the controversies they heard, the Court of Claims' authority was limited to reporting its findings and conclusions to Congress—including the preparation of bills, for congressional approval, awarding the relief thought appropriate if the decision was in favor of the claim-

[61] The subsequent creation of the Commerce Court and the Emergency Court of Appeals shows that Congress can validly establish Article III courts with limited jurisdiction. *See Lockerty* v. *Phillips*, 319 U.S. 182, 187–188.

ant. Congress retained the power to approve or reject its judgments. *Supra,* pp. 48–49.

In 1863, in response to the recommendation of the President, Congress sought, by the enactment of the Act of March 3, to relinquish its power of revision over the judgments of the court and to make them final, subject only to appeal to this Court in cases in which the amount in controversy exceeded $3,000 and in certain other instances. *Supra,* pp. 49–51. Were it not for the 14th section of that Act, which was added to the measure during the floor debates, and which this Court construed in *Gordon* v. *United States,* 2 Wall. 561, 117 U.S. 697, as granting to the Secretary of the Treasury a revisory authority over the court's judgments, the 1863 Act would have made its judgments final in the sense required by this Court as a condition of its exercise of appellate review. As it was, as a consequence of the *Gordon* interpretation, the court's judgments did not achieve finality until the passage of the Act of March 17, 1866, repealing Section 14 of the 1863 Act. Thereafter, this Court regularly and without question reviewed its judgments. *Supra,* pp. 52–56.

It is our position that, with the passage of the 1866 Act, and the elimination of the last remaining obstacle to its recognition by this Court as a tribunal whose decisions could be reviewed consistently with the finality requirements imposed by Article III, the Court of Claims succeeded to full status as an Article III tribunal. There is no constitutional objection to this conclusion. Certainly, this Court perceived none when in *United States* v. *Klein,* 13 Wall. 128, it de-

clared that the Court of Claims, though originally a court "merely in name," had, by the 1863 and 1866 amendments to its original organic act, become a court in fact as well, and was then "constituted one of those inferior courts which Congress authorizes * * * from which appeal regularly lies to this court" (at 144–145; see *supra,* pp. 62–63). The "inferior courts which Congress authorizes" can be none other, as we have suggested, than the "inferior Courts" which Congress is authorized by Article III, Section 1, "from time to time" to "ordain and establish." The Court thus recognized—without the suggestion of any constitutional difficulty—the emergence of the Court of Claims from a body whose judgments lacked the essential judicial attribute of finality into an Article III court.

b. If Congress, instead of simply amending the organic act establishing the Court of Claims so as to make its judgments final, had abolished the court and immediately reconstituted it as before (except with the power to render final judgments), and if the incumbent judges had then been immediately reappointed by the President and confirmed by the Senate, there could be no question as to the legitimacy of the process of thus converting the body into a court of Article III status. Essentially the same result, we contend, was achieved by what was actually done. The fact that the process followed did not contemplate the reappointment and reconfirmation of the incumbent judges did not prevent the achievement of that result.

Conceivably, if the judges had previously served under tenures for fixed periods or at the pleasure of the President, their reappointment and reconfirma-

tion to positions on what was thenceforth to be an Article III tribunal might have been required. In fact, however, the incumbent judges already had life tenure, and their salaries were fixed by law. It would seem an unduly rigid interpretation of the Constitution to hold that, in these circumstances, their renomination by the President and reconfirmation by the Senate were required. Congress, by investing the judgments of the court with finality—the only factor which was a bar to its possession of Article III status—merely gave up (in addition to its revisory authority over the court's judgments) its power to reduce the judges' tenure and diminish their compensation. Though this change sufficed to make the court an Article III court and its judges Article III judges, it cannot be said to have interfered in any meaningful or substantial sense with the President's appointment power—any more than, for example, a statutory increase in the salaries or emoluments of the judges would have had this effect. As we point out in our *Lurk* brief, No. 481, at pp. 48–49, Congress has often made far more drastic alterations in the tenure or compensation of incumbent officials without encroaching upon the Presidential power of appointment. "It cannot be doubted," as this Court observed in *Shoemaker* v. *United States*, 147 U.S. 282, 301, "* * * that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." In the absence of a clear congressional purpose to abolish the old office and create a new one, a change of the type involved here

did not constitutionally require new appointments and new confirmations.

c. If it be assumed, *arguendo,* that the transition of the court from non-Article III to Article III status could not constitutionally be accomplished without giving the President the right to reappoint the incumbent judges or to make new appointments, and the Senate the right to approve or reject the nominees, it would be our contention that the rights were waived. At least, so far as we are aware, no question was ever raised concerning the matter. Both the 1863 and 1866 Acts were approved by the respective Presidents then in office, with knowledge that the incumbent judges, under the plan of the statutes, were to continue in office. Furthermore, the only judges about whose tenures a question could arise were those sitting on the effective date of the 1866 Act. If our argument that the court became an Article III tribunal at that time be sound, not even a theoretical problem exists as to the judges appointed since that date—whose number of course includes nearly all the judges who have sat on the court.

3. In any event, the court became a constitutional tribunal in 1911 with the enactment of the Judicial Code of that year. We have pointed out that the existing statutory provisions pertaining to the duties, functions, and powers of the Court of Claims were at that time transferred to the Code and codified as Chapter Seven, together with the corresponding provisions relating to the regular federal courts (*supra,* pp. 59–60). While the 1911 Code, in terms, provided that the court should "be continued," it also reenacted

the substance of the court's organic act, or "charter." Section 136 provided (36 Stat. 1135):

> The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury.[62]

At the time of this reenactment of the court's charter, the court, as we have seen, had been explicitly declared by this Court, on at least three occasions, to be an Article III tribunal (*United States* v. *Klein,* 13 Wall. 128, 144–145 (1871); *United States* v. *Union Pacific Railroad Co.,* 98 U.S. 569, 603 (1878); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386 (1902)), and on other occasions this Court had at least so assumed or implied. *Supra,* pp. 61–65. Since Congress, when it reenacts a statute, is presumed to adopt the construction given to the same language in the prior statute (see, *e.g., Shapiro* v. *United States,* 335 U.S. 1, 16, and cases cited), Congress, in reenacting the organic legislation establishing the

---

[62] The language of the section was derived, with minor changes, from Section 1049 of the Revised Statutes.

Court of Claims, must be presumed to have intended to adopt the then settled view that the Court of Claims was an Article III tribunal. In a real sense, therefore, Congress can be said to have re-created or reconstituted the Court of Claims as a constitutional tribunal when it enacted the Judicial Code.

2. THE SUBSEQUENT VESTING IN THE COURT OF CERTAIN NON-JUDICIAL FUNCTIONS (IN ADDITION TO ITS JUDICIAL DUTIES) DID NOT AFFECT ITS ARTICLE III STATUS

In 1883, some seventeen years after the court acquired Article III status (under our analysis of the effect of the 1863 and 1866 Acts), Congress conferred on the court, in addition to its regular judicial duties, certain non-judicial functions of an essentially advisory nature—its so-called congressional and departmental reference jurisdiction. Section 1 of the Act of March 3, 1883, c. 116, 22 Stat. 485 (Appendix A, *infra,* pp. 125–126), provided that whenever any claim or matter involving the necessity of investigating and determining facts was pending before either house of Congress or any committee of either house, the house or committee might refer the matter to the Court of Claims, which was to inquire into the matter and, without entering any judgment, to report its findings and conclusion to the house or committee by which the matter had been referred. The court still retains this function.[63] Section 2 of the 1883 Act

[63] As subsequently amended, this provision is now contained in 28 U.S.C. 1492 and 2509 (Appendix A, *infra*, pp. 116–117). A similar advisory function—that of examining and reporting to Congress concerning certain special claims (now of only historical interest) known as the French Spoliation Claims—

provided for the similar referral to the court of matters and claims pending in any executive department involving controverted questions of fact or law; the court was to report its findings and opinions to the referring department for its guidance and action. This provision, as later amended,[64] was repealed in 1953.[65] We submit that the conferring of these nonjudicial functions on the court did not destroy or affect its Article III status.

a. In the first place, the granting of these special advisory functions to the court could not have impaired its constitutional status as a tribunal deriving its authority from Article III if, as we have argued, it had that status previously. If the court was a constitutional tribunal prior to 1883, the attempted vesting by Congress of inconsistent powers could not have altered its character. At most, the attempt to grant such authority would have been ineffectual.[66] See *Pope* v. *United States,* 323 U.S. 1, 13.

b. But we do not believe that the vesting of these additional functions was inconsistent with the court's Article III nature. *O'Donoghue* v. *United States,* 289 U.S. 516, indicates that the possession by a federal court of some powers and functions not judicial in character is compatible with its status as a tribunal ordained and established under Article III. 289 U.S.

---

was given to the court by the Act of January 20, 1885, c. 25, 23 Stat. 283.

[64] See 28 U.S.C. (1952 ed.) 1493.

[65] Act of July 28, 1953, c. 253, § 8, 67 Stat. 226.

[66] We suggest below (note 70, *infra*, pp. 107–108) that the judges of the Court of Claims may be acting as commissioners in reporting to Congress in congressional reference cases.

at 545–548, 550–551. The *O'Donoghue* case held that the superior courts of the District of Columbia were established by Congress pursuant to its court-creating authority under Article III, with the consequence that the judges of those courts enjoy the immunity guaranteed by that article against reduction of their compensation during their continuance in office. 289 U.S. at 551. At the same time, the Court recognized the authority of Congress, acting under its plenary power to legislate for the District of Columbia (Article I, Section 8, clause 17), to vest in the courts of the District, in addition to their Article III judicial functions, administrative and even legislative powers,[67] which could not have had their source in Article III. 289 U.S. at 545–548, 550–551.

We submit that the rationale of the *O'Donoghue* case is also applicable to the Court of Claims with respect to its special advisory powers. For one thing, that court, like the courts of the District, is located at the seat of government, within the area over which Congress possesses exclusive power to legislate.[68] Congress can, pursuant to the same authority which it exercises in conferring non-judicial powers on the or-

---

[67] See, *e.g.*, *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 440–443 (review of rate making); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 698–701 (patent and trade-mark appeals); *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467–468 (review of radio station licensing; cf. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 274–278); see also D.C. Code, § 31–101 (authorizing District Court judges to appoint members of the Board of Education).

[68] The District is the official station of the court's judges (28 U.S.C. 456), and the court is required by law to hold an annual term "at the seat of government" (28 U.S.C. 174).

dinary courts of the District, validly vest similar powers in the Court of Claims, as if that court were for these purposes a superior court of the District. This is by no means a far-fetched concept. It is true, of course, that the functions of the Court of Claims are national in scope and that its jurisdictional subject matter and area of interest are in no sense confined to the geographical limits of the District of Columbia. But it is also true that neither the judicial nor the non-judicial functions of the ordinary superior courts of the District are necessarily limited to matters of concern only to the District. This Court has never suggested, for instance, that the non-judicial functions of the Court of Appeals for the District of Columbia must be confined to District matters. For example, the radio station whose licensing was involved in *Federal Radio Commission* v. *General Electric Co.,* 281 U.S. 464 (see note 67, *supra,* p. 104), was located in Schenectady, New York. The authority of Article I, Section 8, clause 17, which has been held sufficient basis for imposing general federal functions, non-judicial in character, on the Court of Appeals, should suffice, too, for doing the same with respect to another court within the District. While the Court of Claims is national in the scope of its functions, the congressional power relating to the District of Columbia is also national in scope and may be exercised beyond the confines of the District. See *Cohens* v. *Virginia,* 6 Wheat. 264, 424, 425, 428–429; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 600–602 (opinion of Jackson, J.).

Furthermore, we suggest that Congress may properly draw upon its other Article I powers in adding non-judicial functions to the Court of Claims. The plenary power of Congress "to pay the Debts * * * of the United States" (Article I, Section 8, clause 1 (Appendix A, *infra,* p. 113)) sustains the establishment of such non-judicial machinery. The problem is, of course, the joinder of these functions with the court's judicial responsibilities stemming from Article III. In the past, this Court and individual Justices have rejected, in general terms, the exercise by federal constitutional courts, other than the District of Columbia courts, of non-judicial functions. See, *e.g., Ex parte Bakelite Corporation,* 279 U.S. 438, 454; *O'Donoghue* v. *United States,* 289 U.S. 516, 546–547, 551; *Williams* v. *United States,* 289 U.S. 553, 569; *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582. Theoretically it is difficult to distinguish, in this connection, the District of Columbia power in Article I, Section 8, from the other heads of legislative authority in Article I. But the Court's concern for the nationwide federal court system prompts the thought that there well may be a difference, with respect to the joinder of non-judicial functions, between this Court and the regular federal courts in the states, on the one hand, and special constitutional courts established for special purposes, on the other. The reasons impelling the Court to protect the regular federal courts against non-judicial encroachment[69]—mainly the fear of unloosing upon

[69] See, *e.g., National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 590–591, 616, 628–629, 648–649.

those courts a mass of duties foreign to their role as judges—apply with less force to the specialized tribunals with their limited functions and areas of responsibility (particularly the specialized courts determining issues between citizens and their government). The analogy of the District of Columbia courts indicates that, so long as these specialized courts are primarily endowed with judicial power under Article III, the addition of certain non-judicial functions is valid and does not destroy the Article III character of the court. It seems an unduly rigid interpretation of the Constitution to hold that Congress cannot combine in a particular tribunal, designed for a special field, both Article III powers and certain non-judicial functions pertaining to matters falling within the field of its judicial competence—that, for example, with specific reference to the Court of Claims, if Congress desires an advisory opinion as to the merits of a claim against the United States to which it proposes to give legislative consideration in the form of a private bill, it is constitutionally required to establish a special body for that purpose only, and may not make use of an existing court which, being staffed with judges expert in the field of claims, is well qualified to advise the legislature. Properly applied, the principle of the separation of powers does not compel that result.[70]

[70] There is some authority for the proposition that even judges of the regular federal courts may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the govern-

IV

The Congressional Declaration in the 1953 Act Should Be Given at Least Prospective Effect

A. If the Court, adhering to its *Williams* decision, should hold that the congressional assumption underlying the declaration in the 1953 Act—that the Court of Claims already was an Article III court—is insupportable on historical or other grounds, we submit that the Act should be given at least prospective effect, *i.e.*, that the court should be held to have been made an Article III tribunal by the Act. Cf. *Postmaster-General* v. *Early*, 12 Wheat. 136, 148–149; *United States* v. *Claflin*, 97 U.S. 546, 548–549. As observed by Chief Justice Marshall in the *Early* case (holding that a statute which purported to vest certain jurisdiction in district courts "concurrent with" the circuit courts, effectually gave the jurisdiction to the circuit courts, though the assumption of the act—

---

ment, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as "commissioners" and not as a court. Subsequently the judges of some district courts did act in such capacity. See *United States* v. *Ferreira*, 13 How. 40; see also the note concerning the unreported 1794 case of *United States* v. *Yale Todd*, appended to the report of the *Ferreira* case (p. 51). The judges of the Court of Claims have said that they assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Sanborn* v. *United States*, 27 C. Cls. 485, 490, mandamus to permit appeal denied, *In re Sanborn*, 148 U.S. 222. Cf. *Zadeh* v. *United States*, 124 C. Cls. 650.

that the circuit courts already possessed the power in question—was mistaken):

> It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. * * * [12 Wheat. at 148–149.]

It cannot be doubted that the 1953 Act, "declar[ing]" the Court of Claims "to be a court established under article III of the Constitution," used language that is capable of being given at least future effect—particularly if such construction is necessary to effectuate the congressional intention to the extent constitutionally possible.

B. Nor, we submit, are there valid constitutional objections to this construction. The possible argument that such an interpretation would require the reappointment and reconfirmation of the incumbent judges has already been answered. See *supra,* pp. 97–100. It is sufficient at this point to stress that the judges who sat on the court at the time of the 1953 enactment, like the judges of 1866, already had life tenure (as required by Article III), and had already

been appointed by the President and confirmed by the Senate (as required by Article II, Section 2). All that Congress surrendered by the 1953 Act (if, as we are here assuming, the court thereby became an Article III court) was its theoretical power to shorten the judges' tenure and reduce their compensation. For the reasons previously suggested, the relinquishment of this power, in our view, hardly sufficed to require that the incumbent judges again be nominated and confirmed. It is certain that neither Congress nor the President thought so.

The nature of the powers exercised by the court likewise presents no constitutional impediment to construing the 1953 Act as making the court a constitutional tribunal. Its basic jurisdiction has been purely judicial, as we have seen, since 1866. See *supra,* pp. 49–56; *Pope* v. *United States,* 323 U.S. 1, 13. And there is no valid reason, as we have argued (*supra,* pp. 103–107), why the court may not be permitted to continue to exercise its essentially advisory congressional reference jurisdiction as a constitutional court. In any event, to the extent that doubt may exist as to the compatibility of this advisory function of the court with constitutional status, the doubts were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,[71] and Senator Gore discussed the problem during the Senate debates. 99 Cong. Rec. 8943–8944. Thus Congress, by enacting the 1953 statute, elected to give the court constitutional

[71] The hearings held by the committee have not been printed.

status (or, as we have primarily contended, to clarify that status) regardless of what effect its action might be deemed to have on its advisory duties.

For these reasons, we submit that the status of the Court of Claims as an Article III court has been settled by the 1953 Act insofar as the period since that statute is concerned, whatever may have been its status prior to that time.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Act of July 28, 1953, c. 253, § 1, 67 Stat. 226, declaring the Court of Claims to be a court established under Article III of the Constitution, is valid, and that the judgment below was not vitiated by the participation of a Court of Claims judge.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
PHILIP R. MONAHAN,
Attorney.

JANUARY 1962.

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. *Constitutional Provisions*

1. Article I, Section 8, of the United States Constitution:

> SECTION 8. The Congress shall have Power [Clause 1] To lay and collect Taxes, Duties, Imposts and Excises, to Pay the Debts * * * of the United States * * *;
>
> * * * * *
>
> [Clause 9] To constitute Tribunals inferior to the supreme Court;
>
> * * * * *
>
> [Clause 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *;—And
>
> [Clause 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

2. Article III of the United States Constitution:

> SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under

this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— * * * to Controversies to which the United States shall be a Party; * * *.

* * * * *

II. *Statutes*

1. 28 U.S.C. 171 (as amended by Section 1 of the Act of July 28, 1953, c. 253, 67 Stat. 226; see *infra*, pp. 128–129):

> § 171. *Appointment and number of judges; character of court.*
>
> The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

2. 28 U.S.C. 293(a):

> § 293. *Judges of other courts.*
>
> (a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

3. 28 U.S.C. 1346:

> § 1346. *United States as defendant.*
>
> (a) The district courts shall have original

jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title [Tort Claims Procedure], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

* * * * *

4. 28 U.S.C. 1491:

§ 1491. *Claims against United States generally;* * * *

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any

express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * *

5. 28 U.S.C. 1492:

§ 1492. *Congressional reference cases.*

The Court of Claims shall have jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill is one over which the court has jurisdiction under other Acts of Congress.

6. 28 U.S.C. 1503:

§ 1503. *Set-offs.*

The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

7. 28 U.S.C. 1504:

§ 1504. *Tort claims.*

The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title [see *supra,* p. 115] if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.

8. 28 U.S.C. 2509:

§ 2509. *Congressional reference cases.*

Whenever any bill, except for a pension, is referred to the Court of Claims by either House of Congress, such court shall proceed with the same in accordance with its rules and report to such House, the facts in the case, including facts relating to delay or laches, facts

bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy.

The court shall also report conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

9. The Act of February 24, 1855, c. 122, 10 Stat. 612, entitled "An Act to establish a Court for the Investigation of Claims against the United States":

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to sup-

port the Constitution of the United States and discharge faithfully the duties of his office.

SEC. 2. *And be it further enacted*, That a solicitor for the United States, to represent the government before said court, shall be appointed by the President, by and with the advice and consent of the Senate. It shall be the duty of said solicitor to prepare all cases on the part of the government for hearing before said court, and to argue the same when prepared; to cause testimony to be taken, when necessary to secure the interest of the United States; to prepare forms, file interrogatories, and superintend the taking of testimony, in the manner prescribed by said court, and generally to render such services as may be required of him from time to time, in the discharge of the duties of his office. Said solicitor shall be sworn to faithful discharge of the duties of his office, in the manner prescribed for the qualification of the judges in the first section of this act; and he shall receive a compensation of three thousand five hundred dollars per annum for his services, to be paid quarterly from the treasury of the United States.

SEC. 3. *And be it further enacted*, That the said court shall have authority to establish rules and regulations for its government; to appoint commissioners to take testimony to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services, and to issue commissions for the taking of such testimony, whether the same shall be taken at the instance of the claimant, or of the United States, and also to issue subpoenas to require the attendance of witnesses in order to be examined before such commissioners; which subpœnas shall have the same force, as if issued from a district court of the United States, and compliance therewith shall be compelled under such rules and orders as the court hereby created shall establish.

When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when taken at the instance of the government, such fees, together with all postage incurred by the solicitor aforesaid in his official capacity, shall be paid out of the contingent fund provided for said court. In all cases, when it can be conveniently done, the testimony shall be taken in the county where the deponent resides; and the commissioner taking the same is hereby authorized and required to administer an oath or affirmation to the witnesses brought before him for examination.

SEC. 4. *And be it further enacted,* That in all cases where it shall appear to the court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony in the case, until the same shall have been reported by them to Congress, as is hereinafter provided: *Provided, however,* That if Congress shall, in such case, fail to confirm the opinion of said board, they shall proceed to take the testimony in such case.

SEC. 5. *And be it further enacted,* That in taking testimony to be used in support of any claim before said court, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe, and like opportunity shall be afforded the claimant in cases where testimony is taken on behalf of the United States under like regulations.

SEC. 6. *And be it further enacted,* That if any person shall knowingly and wilfully swear falsely before said court, or before any person or persons commissioned by them, or authorized by this act to take testimony in a case pending before said court at the time of taking

said oath, or in a case thereafter to be submitted to said court, such person shall be deemed guilty of perjury, and, on conviction thereof, shall be subjected to the same pains, penalties, and disabilities which now are, or shall be hereafter, by law prescribed for wilful and corrupt perjury.

SEC. 7. *And be it further enacted,* That said court shall keep a record of their proceedings, and shall, at the commencement of each session of Congress, and at the commencement of each month during the session of Congress, report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded. Any judge who may dissent from the opinion of the majority shall append his reasons for such dissent to the report; and such report, together with the briefs of the solicitor and of the claimant, which shall accompany the report, upon being made to either house of Congress, shall be printed in the same manner as other public documents. And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect. And two or more cases may be embraced in the same bill, where the separate amount proposed to be allowed in each case shall be less than one thousand dollars. And the said court shall transmit with said reports the testimony in each case, whether the same shall receive the favorable or adverse action of said court.

SEC. 8. *And be it further enacted,* That said reports, and the bills reported as aforesaid, shall, if not finally acted upon during the session of Congress to which the said reports are made, be continued from session to session, and from Congress to Congress, until the same

shall be finally acted upon, and the consideration of said reports and bills shall, at the subsequent session of Congress, be resumed, and the said reports and bills be proceeded with in the same manner as though finally acted upon at the session when presented.

SEC. 9. *And be it further enacted,* That the claims reported upon adversely shall be placed upon the calendar when reported, and if the decision of said court shall be confirmed by Congress, said decision shall be conclusive; and the said court shall not, at any subsequent period, consider said claims unless such reasons shall be presented to said court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

SEC. 10. *And be it further enacted,* That it shall be the duty of the Speaker of the House of Representatives, within a reasonable time after the passage of this act, to appropriate such rooms in the Capitol at Washington, for the use of said court, as may be necessary for their accommodation, unless it shall appear to the Speaker that such rooms cannot be appropriated without interfering with the business of Congress; and, in that event, the said court shall procure, at the city of Washington, such rooms as may be necessary for the convenient transaction of their business.

SEC. 11. *And be it further enacted,* That said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act. Said court shall appoint a chief clerk, whose salary shall be two thousand dollars per annum, and an assistant clerk, if deemed necessary, whose salary shall be fifteen hundred dollars per annum, and a messenger, whose

salary shall be eight hundred dollars per annum, to be paid quarterly at the treasury. The said clerks shall be under the direction of said court in the performance of their duties, and for misconduct or incapacity may be removed from office by it; but, when so removed, said board [*sic*] shall make report thereof, with the cause of such removal, to Congress, if in session, or at the next session of Congress. Said clerk and assistant clerk shall take an oath for the faithful discharge of their duties: *Provided,* That the head of no department shall answer any call for information or papers if, in his opinion, it would be injurious to the public interest.

10. The Act of March 3, 1863, c. 92, 12 Stat. 765, entitled "An Act to amend 'An Act to establish a Court for the Investigation of Claims against the United States,' approved February twenty-fourth, eighteen hundred and fifty-five":

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate, two additional judges for the said court, to hold their offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justice for said court.

SEC. 2. *And be it further enacted,* That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by res-

olution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid.

SEC. 3. *And be it further enacted,* That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

SEC. 4. *And be it further enacted,* That the said court of claims shall hold one annual session, commencing on the first Monday in October in each year, and continuing so long as may be necessary for the prompt disposition of the business of the court. The said court may prescribe rules and regulations for practice therein, and it may punish for contempt, in the manner prescribed by common law. It may appoint commissioners, and may generally exercise such powers as are necessary to carry out the powers herein granted to it. * * * The judges and clerks of said court may administer oaths and affirmations, take acknowledgments

of instruments in writing, and give certificates of the same. Said court shall have a seal, with such device as it may order. Members of either house of Congress shall not practice in said court of claims.

SEC. 5. *And be it further enacted,* That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided,* That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further,* That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

SEC. 6. *And be it further enacted,* That the solicitor, assistant solicitor, and deputy solicitor of said court, shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and it shall be their duty faithfully and diligently to defend the United States in all matters and cases before said court of claims; and in all cases taken by appeal therefrom to the supreme court; * * *

SEC. 7. *And be it further enacted,* That in all cases of final judgments by said court, or on appeal by the said supreme court where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury

of a copy of said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge, of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided,* That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon a contract expressly stipulating for the payment of interest, and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report *or* [a] statement of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed: *And it is further provided,* That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further,* That any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

* * * * *

SEC. 14. *And be it further enacted,* That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

11. The Act of March 3, 1883, c. 116, 22 Stat. 485:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the house by which the case was transmitted for its consideration.

SEC. 2. That when a claim or matter is pending in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted for its guidance and action.

* * * * *

12. The Act of March 3, 1887, c. 359, 24 Stat. 505 (Tucker Act):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regu-

lation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

* * * * *

13. The Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV), §§ 410(a), 412(a), 60 Stat. 842, 843–844:

> SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, * * * sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. * * *
>
> * * * * *
>
> SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—
>
> (1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; or
>
> (2) in the Court of Claims of the United States: *Provided,* That the notice of appeal filed in the district court * * * shall have affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims of the United States. * * *

14. The Act of July 28, 1953, c. 253, § 1, 67 Stat. 226:

> *Be it enacted by the Senate and House of Representatives of the United States of America*

in Congress assembled, That section 171 of title 28, United States Code, is amended by adding at the end thereof the following:

"Such court is hereby declared to be a court established under article III of the Constitution of the United States."

APPENDIX B

Waiver of Sovereign Immunity in Anglo-American Law Prior to the Adoption of the Constitution

I. ENGLISH PRACTICE

Long before 1787 it was a common practice in England for the sovereign to waive his immunity from suit and permit individuals to assert their claims against the Crown in the courts. The waiver of immunity was limited to particular types of claims and governed by special procedures. The development of these remedies against the Crown are traced by Holdsworth in his *History of English Law,* vol. IX, pp. 7–45, and may be summarized as follows:

It was recognized as early as the thirteenth century that the King was subject to the law and that, although ordinary writs did not lie against him in his courts, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. As yet, the methods by which the King could be approached were very informal (*id.* p. 10). A request or petition for justice to the King would often assume some of the characteristics of an ordinary action. Litigants would sometimes vouch the King to warranty as if he were a common person. But the procedure for obtaining redress by petition was becoming a more settled practice and developing characteristics very different from those in an ordinary action (*id.* p. 11).

From the fourteenth to the middle of the seventeenth century, the nature of a petition of right became fixed (*id.* p. 12). Petitions which asked for

something which the suppliant could claim as a right, if the claim were made against anyone but the King, were known as "petitions of right." Petitions which asked only for some favor to which the petitioner could have no legal claim were "petitions of grace" (*id.* pp. 13–14). Although the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been rendered on a petition of right (*id.* p. 15).

The main use of the petition of right in the Middle Ages was to gain redress for wrongs which, if the case had been between subject and subject would have been redressed by some of the *real* actions (*id.* pp. 17–18). The real actions covered a much larger field than that covered by the land law at the present day. Many objects which would now be effected by the making of a contract, and many wrongs which would now be redressable by action in tort were attracted to the law of property and were redressable by real actions. For example, instead of making a contract to pay a sum of money, the men of the Middle Ages granted an annuity or a corody; and where we would bring an action on the case for a nuisance, they would bring an assize of nuisance, or an assize of novel disseisin, or *quod permittat.* In addition to the wide field of wrongs redressable by the real actions, a petition would lie for a chattel interest in land; and according to the better opinion for chattels personal (*id.* pp. 17–19).

While the petition of right did not lie for breach of contract, this was partly due to the fact that the law of contract was not yet fully developed, and partly to the fact that petitioners had alternative remedies (*id.* p. 21). Thus, a petition lay for omission to pay an annuity or a corody, because such a proceeding

was regarded as a proceeding to recover an incorporeal thing; and a judgment could be given against the King to give a recompense if he had failed in his duty to warrant the title of his grantee (*id.* p. 20). In the case of ordinary money claims, a petition to the King for a writ of liberate, ordering the Exchequer to pay, or for a direction that the barons of the Exchequer should hear the petitioner's claim, was an easier and more expeditious remedy. In the main, however, the chief use made of the petition of right in the Middle Ages was the redress of grievances which, as between subject and subject, would have been redressed by some one of the real actions (*id.* p. 21).

Other remedies than the petition of right arose against the Crown because of the great procedural defects attached to the use of a petition of right (*id.* p. 22). (1) There was a lengthy preliminary procedure before the legal question at issue could be brought before the court. The petition had to be endorsed "let right be done" (*id.* p. 16). A special commission was then issued by the Chancery to take an inquest to find the facts. If the facts were not found satisfactorily, a second commission might issue to find them again (*id.* p. 22). If they were found satisfactorily, it was sometimes necessary to put in a second petition to stir up the Crown to take the necessary step of answering the petitioner's plea and coming to an issue which could be heard on the common-law side of the Chancery, or sent into the King's Bench for trial (*id.* pp. 17, 22). In all cases begun by petition, the Crown could delay the petitioner by instituting a search for records which would support his title. (2) The Crown had many advantages in pleading. All conveyances and accounts which gave possession to the King had to be expressly stated in a

petition. At any time, the King could stop a proceeding by the issue of a writ *rege inconsulto;* and the judges could not then proceed without an order from the King. (3) When the petition of right turned upon a complaint redressable by a real action (which was usually the case), all the reasons which made real actions so dilatory applied to these proceedings. (4) The rule that a demandant could recover if he could show a better right than the tenant, did not apply to the King. To recover against the King, an absolute right had to be shown (*id.* p. 23).

The procedural difficulties outlined above gave rise to the remedies by traverse and *monstrans de droit.* The procedure by traverse arose as follows: One of the most usual ways in which the King secured possession of chattels or lands belonging to a subject was by the holding of an inquisition on the death of his tenant, or on the attainder or lunacy of any person. When the inquest found that the subject was possessed of certain property, this was seized by the King, who was then said to be entitled by office found. As a general rule, anyone whose right was set aside by this finding, *e.g.,* a person who had been disseised by the tenant or lunatic, was left to his remedy by petition. In a few cases, however, the law allowed a person aggrieved to traverse, if he could, the facts found by the office entitling the King to possession (*id.* p. 24). The number of these cases was at first very small, but was increased by statute in 1360 and again in 1362. This latter statute also established the remedy of *monstrans de droit,* which allowed the subject in certain cases to confess the title found for the King and avoid it by showing his own right (*id.* p. 25). This statute was construed liberally and was further extended by an Act of 1548 (*id.* p. 26).

These remedies had three main advantages over the petition of right: (1) They cut out all the preliminary stages of procedure attached to the petition of right—the presentation of the petition, the issue of a special commission, searches for evidence for the King. (2) It was not necessary to get the King's special permission to go on with the hearing of the case. (3) The remedy of *monstrans de droit* substituted for an inquiry at large into the title of the parties an inquiry into a specific defect in the office (*id.* p. 26).

The new remedies also had their disadvantages. (1) A party could not take advantage of a traverse unless the King had taken possession by an office found. Similarly, in order to take advantage of a *monstrans de droit,* he must have gotten seisin by office found, or in some other way which could not be traversed; and the subject must be able to confess the King's right and avoid it by showing his own right. (2) If the King was entitled, not only by the office found, but by another title of record, the subject could not until 1548 traverse or confess and avoid both (*id.* p. 27). (3) The analogy of the case where a disseisee's right of entry was tolled and turned to a right of action was applied to determine the question whether a complainant could sue by *monstrans* or petition of right (*id.* p. 28). Were it not for these limitations, the remedies of traverse and *monstrans de droit* would have completely superseded the petition.

In addition to these two new remedies, extended powers of relief against the Crown became available to the subject in the new Courts of Augmentations, Wards, and Surveyors, which were created by statute in the reign of Henry VIII and subsequently merged into the Court of Exchequer (*id.* p. 29). While these

courts were primarily administrative departments for the management on business lines of a vast quantity of property, they were given judicial powers which were very likely to be used when the Crown itself was a party. The Court of Augmentations, erected by statute in 1536, served partly as a department of audit, partly as an estate office, and partly as a franchise court to deal with the vast quantity of land confiscated from monasteries. The Court of Wards, created in 1540, was similarly constituted to manage the ancient feudal revenues of the Crown and especially to enforce the rights of wardship and marriage. The jurisdiction of these courts and the Court of Surveyors was varied many times by statute, copies of which are not all available.[1] Generally speaking, it seems that these financial courts entertained claims with respect to the particular property turned over to such courts for administration (*id.* p. 30).[2]

From 1615 to the first part of the nineteenth century, there appear to be no reported cases based upon the petition of right.[3] However, during this period, several new remedies emerged for securing relief against the Crown.

Equitable relief.—In the case of *Pawlett* v. *Attorney General,* Hardres, 465 (1668), it was first clearly recognized that the subject was entitled to equitable relief against the Crown. In that case the plaintiff had mortgaged property to a mortgagee.

---

[1] Plucknett, *A Concise History of the Common Law* (3d ed.), p. 158.

[2] For example, the statute of 1541 (33 Henry VIII, c. 39), creating the Court of Surveyors, authorized the Court of Augmentations to determine claims by patentees against the King for defects in the interests which the King had purported to transfer to them.

[3] Ehrlich, *Petitions of Right*, 45 L. Q. Rev. 60, 61, 62 (1929).

The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property. The plaintiff brought his bill in the Exchequer against the Attorney General for redemption. In finding for the plaintiff, the court rejected the argument that the plaintiff could only proceed by petition to the King. Chief Baron Hale based his decision on the ground that the Exchequer had jurisdiction in the matter as inheritor of the powers of the Courts of Augmentations and Surveyors. Atkyns, B. put the jurisdiction on a much broader basis, but his view was not accepted until after the eighteenth century. For some time the jurisdiction to give equitable relief against the Crown was supposed to be peculiar to the Court of Exchequer[4] (*id.* p. 30).

Petition to the barons.—Another remedy against the Crown arose out of the celebrated *Bankers' Case,* 14 S. T. 1 (1690–1700). In return for certain loans, Charles II granted to the Bankers annuities charged on the hereditary excise. After 1683, payments were in arrears, and after the Revolution, the Bankers presented a petition to the barons of the Exchequer for payment of the amounts due to them. The case turned on whether this was a proper method of procedure for asserting such a claim, and the House of Lords held in the affirmative. All the judges were of the opinion that the Bankers could also have proceeded by petition of right. This case was of considerable influence in the revival of the petition of right during the nineteenth century (*id.* pp. 32–33). As a result of the *Bankers' Case,* the subject could now not

---

[4] Citing *Reeve* v. *Attorney General,* 2 Atkyns 223 (1741); *Burgess* v. *Wheate,* 1 Eden 177, 255–256 (1757–1759); Bl. Comm., iii, 428–429.

only petition for a writ of liberate, but also petition the barons of the Exchequer for relief (*id.* p. 35).

Thus, the study by Holdsworth shows that there had developed a number of judicial procedures in England for asserting claims against the sovereign, including (1) the petition of right, (2) traverse of office found, (3) *monstrans de droit,* (4) writ of liberate, (5) petition to the barons of the Exchequer, and (6) bill against the Attorney General for equitable relief in the Court of Exchequer. Accordingly the practice of waiving the sovereign's immunity from suit was well known to English law long before the adoption of the Constitution in this country.

II. AMERICAN PRACTICE

1. According to the Virginia Court of Appeals, "it has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an independent state) that all persons have not enjoyed this right by express statute." *Higginbotham's Executrix* v. *Commonwealth,* 66 Va. 627, 637 (1874). The statute here referred to was an Act of 1778[5] establishing a Board of Auditors for public accounts, and including the following provision:

> V. Where the auditors acting according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do

[5] 9 Henings, *Statutes at Large,* p. 540.

> right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity.

An exception to this Act seems to have been adopted in the case of impressed property, for, by an Act of November 1781,[6] the county courts were empowered to receive claims against the public for impressed property, for the purpose of ascertaining the value of the property and then submitting to the legislature a report and a transcript of the proceedings. However, even with respect to impressed property, there is a reported case in which the legislature referred the claimant back to the courts, and he succeeded in securing a judgment in his favor.

In *Commonwealth* v. *Cunningham & Co.*, 8 Va. 331 (1793), the owner of a vessel impressed during the Revolutionary War presented his claim to the county court and in 1784 secured a certificate covering its value. When the auditor refused to honor the certificate, the claimant applied to the legislature, which referred him back to the judiciary. A judgment in his favor in the district court was affirmed by the Court of Appeals. The opinion of the court was written by Judge Pendleton, who had been President of the Virginia Convention elected to consider the Constitution and who had employed his influence to obtain its ratification.[6a] The report of the case shows that the claimant was represented by "Marshall." No doubt this was John Marshall, for Beveridge states (2 Beveridge, *Life of Marshall*, p. 177) that from 1790 until 1799 Marshall argued 113 cases decided by the

---

[6] 10 Henings, *Statutes at Large*, p. 468: "An Act for adjusting claims for property impressed or taken for public services."

[6a] 8 Va. vii.

Court of Appeals, and appeared in practically every important case handled by that tribunal.

2. In Maryland, the legislature, on January 20, 1787, adopted the following statute "to provide a remedy for creditors and others against the state":

> Whereas individuals may have claims against this state for money, which they cannot settle and adjust with the auditor-general, and it is reasonable that some mode should be adopted to afford such individuals an opportunity of trying the justice of their claims at law;
>
> II. *Be it enacted, by the General Assembly of Maryland,* That any citizen of this state, having any claim against this state for money, may commence and prosecute his action at law for the same against this state as defendant, by issuing a summons directed to the attorney-general, and sending with such summons a short note expressing the cause of action, and such person may declare, that the state is indebted unto him in any sum he thinks proper, and the attorney-general shall plead thereto, and the issue shall be made up, and the jury shall try such issue or issues, and if they find for the plaintiff, they may assess such damages as they may think just, and the same shall be paid by the state, and with costs, if the jury find more due to the plaintiff than admitted by the auditor, but if the jury find for the state, the plaintiff shall pay costs of suit, and be liable to execution therefor; and the attorney-general shall exhibit the claim of the state, if any, and if the jury shall find that the plaintiff is indebted to the state, they may find accordingly, and judgment may thereupon be entered and given against him for such sum and costs of suit, and such plaintiff may appeal in the same manner as private persons can by law appeal in suits between them, on giving bond with security, and the attorney-general may also appeal if he thinks proper.

> III. *And be it enacted,* That where any person shall file a bill in chancery against the state, that process shall and may be served on the attorney-general, which service shall be effectual to all intents and purposes, according to the notice of the process issued; provided, that where any injunction is prayed to stay proceedings at law for the payment of any debt claimed by the state, the chancellor shall not order such injunction on the affidavit of the complainant only, but shall be fully satisfied by other proof, that the material facts in the complainant's bill are true.[7]

3. Under the Georgia Confiscation Act of 1778, forfeiting the estates of persons disloyal to the state during the revolution, all persons claiming any right or interest in a sequestered estate or pretending to be a creditor of the person attainted were to produce and exhibit their claims to a Board of Confiscation Commissioners in the county. The Attorney General was directed "to defend the right of the State, as well before the said boards, as in any of the Superior Courts against the same," and discontented claimants were given the right of appeal from the "determination" of the Board to the Superior Courts.[8] In accordance with this procedure, we find a report of the "Committee on Petitions" of the legislature in 1782 making the following recommendation:

> No. 131 of Elizabeth Whitfield Setting forth that a Certain Lott of Land in the Town of Savannah Sold by the Commissioners of Confiscated Estates, Praying for the said Lott of Land. The Committee are of opinion it ought to be referred to a Court of Law; which was agreed to.[9]

---

[7] 2 Kilty, *Laws of Maryland*, c. LIII.

[8] *Revolutionary Records of the State of Georgia* (compiled by Allen D. Candler, Atlanta, 1908), vol. 1, pp. 334, 341–342.

[9] *Op cit.*, vol. 3, p. 409.

4. Under the New Jersey Confiscation Act of April 18, 1778, the procedure to recover lands improperly seized by the state was in some respects similar to the remedy of traverse of office developed in England. The Commissioners appointed pursuant to the Act were to "make return" to a justice of the peace in the county, of the name and place of late abode of each person "whose Personal Estate and Effects the said Commissioners * * * have seized" and to demand a precept for the summoning of a jury to inquire whether the named person was an offender within the meaning of the Act. After an inquisition by a jury, the justice of the peace was to certify the inquisition and make return to the next Inferior Court of Common Pleas. If the jury found the person to be an offender, a proclamation was to be made in open court to the effect that the "Person against whom such inquisition hath been found or any Person on his Behalf, or who shall think himself interested in the Premises" might appear and traverse the inquisition. Upon the filing of a bond, the traverse was to "be received and a Trial thereon awarded." If no person appeared to traverse the inquisition, the commissioners were to publish the effect of the proclamation within thirty days, after which another opportunity to traverse was to be provided. Should there then be no appearance, the inquisition was to be taken as true and final judgment in favor of the state.[10]

5. Under the North Carolina Confiscation Act of 1779, establishing Boards of Commissioners in each county to administer and sell the estates declared forfeited by the Act, it was provided "that if it shall

---

[10] *Acts of the Council and General Assembly of the State of New Jersey* (1776–1783), compiled by Peter Wilson, Trenton (1784), printed by Isaac Collins, pp. 43–46.

appear to any County Court that any Person * * * has or pretends to have any Right of Title in Law" to any of the property declared forfeited by the Act, "such Court shall stay all further proceedings of the Commissioners thereupon, and shall send up a true and exact State of such Claim to the Superior Court of the District," which was then to "determine the Legal Right and Title of the Person so claiming, by Jury in the same Manner as in Suits at Common Law, and such Determination when had shall be final * * *."[11] By a later act, of 1781, further effort was made to protect the property of "innocent persons" by providing that the county courts were to "make inquiry" to determine what persons "in the opinion of the court" had forfeited their property, and were then to furnish copies of such proceedings to the commissioners of confiscated property. Seemingly, aggrieved persons might institute a proceeding for the return of their property, for the statute expressly provided that the county courts were "impowered at any time to re-consider" their determinations, and "if necessary, to order the property returned to the owners."[12]

6. Delaware clearly recognized that its immunity from suit might be waived, for Article I, Section 9, of its constitution of 1792 provided that: "* * * Suits may be brought against the State, according to such regulations as shall be made by law."[13] Earlier, under the statutes confiscating the property of persons disloyal to the State during the Revolutionary War,

---

[11] *State Records of North Carolina*, edited by Walter Clark, Goldsboro, N.C. (1905), vol. 24, p. 212.

[12] *Id.*, p. 398.

[13] *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America*, H. Doc. 357, 59th Cong., 2d sess., vol. 1, pp. 568, 569.

the courts had played a significant role in adjudicating claims of wrongful seizure and claims by creditors. By the Act of June 5, 1779, it was provided "That the Justices of the Court of Common Pleas in each county" were "to receive the claims and order the trials respecting the title of any * * * lands * * * sold" by virtue of the Act "and claimed by any person * * *." A jury of twelve was to be summoned "to hear, try and determine" such claims and its verdict was to be "final and conclusive to all parties without further appeal." [14]

7. There is some evidence that the judiciary of Connecticut participated in the settlement of claims against the State. This evidence is found in the Act of January 1789, which provided:

> That from and after the first Day of March next, *all Demands against this State, not first liquidated and allowed by* the General Assembly, or by the Governor and Council, or House of Representatives, or *Supreme Court of Errors,* or *by the Superior Court,* or *by a Court of Common Pleas,* by Virtue of some express Law; shall be liquidated and settled by the Comptroller, who shall give Orders on the Treasurer, for the Balances, by him found and allowed, before the Treasurer shall pay the same; any Thing in said Act notwithstanding.[15] [Italics supplied.]

---

[14] *Laws of the State of Delaware* (1700–1797), printed by Samuel and John Adams, New Castle (1797), vol. 2, pp. 658–659.

[15] *Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America; holden at New Haven (by Adjournment) on the first Thursday of January 1789* (New London; printed by T. Green and Son), pp. 375–376.

APPENDIX C

Excerpts From Writings and Debates on the Federal Constitution

I. Comments on the provision of Article III extending the judicial power "to Controversies between a State and Citizens of another State":

1. *Alexander Hamilton* (*The Federalist,* No. 81 (1914 ed., vol. II, pp. 125–126)):

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be

enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. [Emphasis in original.]

2. *John Marshall* (Elliot's *Debates* (2d ed.), vol. III, pp. 555–556):

With respect to disputes between *a state and the citizens of another state,* its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals? [Emphasis in original.]

3. *James Madison* (Elliot's *Debates* (2d ed.), vol. III, p. 533):

> Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

4. *Patrick Henry* (Elliot's *Debates* (2d ed.), vol. III, pp. 543–544):

> As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it. What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New York could not, before the war, collect money from Connecticut! The

state judiciaries are so degraded that they cannot be trusted. This is a dangerous power which is thus instituted. For what? For things which will seldom happen; and yet because there is a possibility that the strong, energetic government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous. Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society and foreign nations? Is there any precedent for a tribunal to try disputes between foreign nations and the states of America? The honorable gentleman said that the consent of the parties was necessary: I say that a previous consent might leave it to arbitration. It is but a kind of arbitration at best.

II. Comments on the provision of Article III extending the judicial power "to Controversies to which the United States shall be a Party":

1. *Luther Martin's* letter to the legislature of Maryland (Elliot's *Debates* (2d ed.), vol. I, pp. 344, 382):

Thus, sir, in consequence of this appellate jurisdiction, and its extension to facts as well as to law, every arbitrary act of the general government, and every oppression of all that variety of officers appointed under its authority for the collection of taxes, duties, impost, excise, and other purposes, must be submitted to by the individual, or must be opposed with little prospect of success, and almost a certain prospect of ruin, at least in those cases where the middle and common class of citizens are interested. Since, to avoid that oppression, or to obtain redress, the application must be made to one of the courts of the United States,—by good fortune, should this application be in the first instance attended with success, and should damages be recovered equivalent to the injury sustained, an appeal lies to the Supreme Court,

in which case the citizen must at once give up his cause, or he must attend to it at the distance, perhaps, of more than a thousand miles from the place of his residence, and must take measures to procure before that court, on the appeal, all the evidence necessary to support his action, which, even if ultimately prosperous, must be attended with a loss of time, a neglect of business, and an expense, which will be greater than the original grievance, and to which men in moderate circumstances would be utterly unequal.

2. *George Nicholas,* at the Virginia Convention (Elliot's *Debates* (2d ed.), vol. III, pp. 476–477):

> * * * But he supposes that Congress may be sued by those speculators. Where is the clause that gives that power? It gives no such power. This, according to my idea, is inconsistent. Can the supreme legislature be sued in their own subordinate courts, by their own citizens, in cases where they are not a party? They may be plaintiffs, but not defendants. * * *

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, etc.,
Petitioner,

vs.

OLGA ZDANOK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

CHESTER BORDEAU,
Counsel for Petitioner,
14 Wall Street,
New York 5, N. Y.

WILLIAM P. SMITH,
THOMAS A. HOPKINS,
LAMBROS J. LAMBROS,
WHITE & CASE,
On the Brief.

INDEX.

	PAGE
OPENING STATEMENT	1
I—The Court of Claims is an Article I, not an Article III, Court	1
II—Judge Madden Was Not A *De Facto* Article III Court Judge	14
III—Judge Madden's participation in the hearing and determination of the appeal in the Court of Appeals vitiated the determination of that court	18
CONCLUSION	18

Table of Cases.

	PAGE
A. L. A. Schechter Poultry Corp. v. *United States*, 295 U. S. 495 (1935)	10
American Construction Co. v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372 (1893)	16
Ayrshire Collieries Corp. v. *United States*, 331 U. S. 132 (1947)	16, 18
Ball v. *United States*, 140 U. S. 118 (1891)	17
Donegan v. *Dyson*, 269 U. S. 49 (1925)	15
Ex parte Bakelite Corp., 279 U. S. 438 (1929)	2, 3, 5, 7
Frad v. *Kelly*, 302 U. S. 312 (1937)	16
Gainesville v. *Brown-Crummer Inv. Co.*, 277 U. S. 54 (1928)	14
Gordon v. *United States*, 117 U. S. 697 (1866)	8
Hayburn's Case, 2 U. S. 409 (1792)	9
In re Sanborn, 148 U. S. 222 (1893)	8
Johnson v. *Manhattan Ry. Co.*, 289 U. S. 479 (1933)	15
Kansas v. *United States*, 204 U. S. 331 (1907)	2
King Bridge Company v. *Otoe County*, 120 U. S. 225 (1887)	15
Lamar v. *United States*, 241 U. S. 103 (1916)	15
Leary v. *United States*, 268 F. 2d 623 (9th Cir. 1959)	17
Luhrig Collieries v. *Interstate Coal & Dock Co.*, 287 F. 711 (2nd Cir. 1923)	17
Mansfield & c., Railway Co. v. *Swan*, 111 U. S. 379, (1884)	15
McDowell v. *United States*, 159 U. S. 596 (1895)	17
McGrath v. *Kristensen*, 340 U. S. 162 (1950)	14
Miles v. *Graham*, 268 U. S. 501 (1925)	2
Minnesota v. *Hitchcock*, 185 U. S. 373 (1902)	2
Muskrat v. *United States*, 219 U. S. 346 (1911)	8, 10
National Mutual Insurance Co. v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582 (1949)	3, 4, 5, 6, 8, 13
Newton v. *Commissioners*, 100 U. S. 548 (1879)	13
Norton v. *Shelby County*, 118 U. S. 425 (1886)	17

PAGE

O'Donoghue v. *United States*, 289 U. S. 516 (1933) 2, 4, 9

Todd v. *United States*, 158 U. S. 278 (1895) 12

United States v. *American-Foreign Steamship Corp.*, 363 U. S. 685 (1960) 15, 16

United States v. *Corrick*, 298 U. S. 435 (1936) 15

United States v. *Emholt*, 105 U. S. 414 (1881) 15

United States v. *Ferreira*, 54 U. S. 40 (1851) 8

United States v. *Klein*, 80 U. S. 128 (1871) 2

United States v. *Louisiana*, 123 U. S. 32 (1887) 2

United States v. *Marachowsky*, 213 F. 2d 235 (7th Cir. 1954) 17

United States v. *Sherwood*, 312 U. S. 584 (1941) 3

United States v. *Union Pacific R.R. Co.*, 98 U. S. 569 (1878) 2

Williams v. *United States*, 289 U. S. 553 (1933) 1, 2, 3, 4, 5, 6, 7, 8, 11

CONSTITUTIONAL PROVISIONS AND STATUTES.

Constitution,

Article I 2, 3, 5, 7, 8, 11, 12, 14

Article III 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

Amendment V 16

Statutes,

Title 28 United States Code

§43 (b) 16

§46 (a), (b), (c), (d) 18

§171 11

§293 (a) 16, 17

§1492 10

§1504 8

MISCELLANEOUS.

99 Cong. Rec., 8944 12